No. 586.

FILED.
MAR 14 1898
JAMES H. McKENNEY,
CLERK

Brf. of Akin, Smith, Blair & Nelson for D. C. Con mo.

Filed Mar. 14, 1898.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

JOSEPH KIPLEY, Superintendent of Police of the City of Chicago, ADOLF KRAUS, HEMPSTEAD WASHBURNE and DUDLEY WINSTON, Civil Service Commissioners,

Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS on the relation of EDWARD C. AKIN, Attorney General of the State of Illinois,

Defendant in Error.

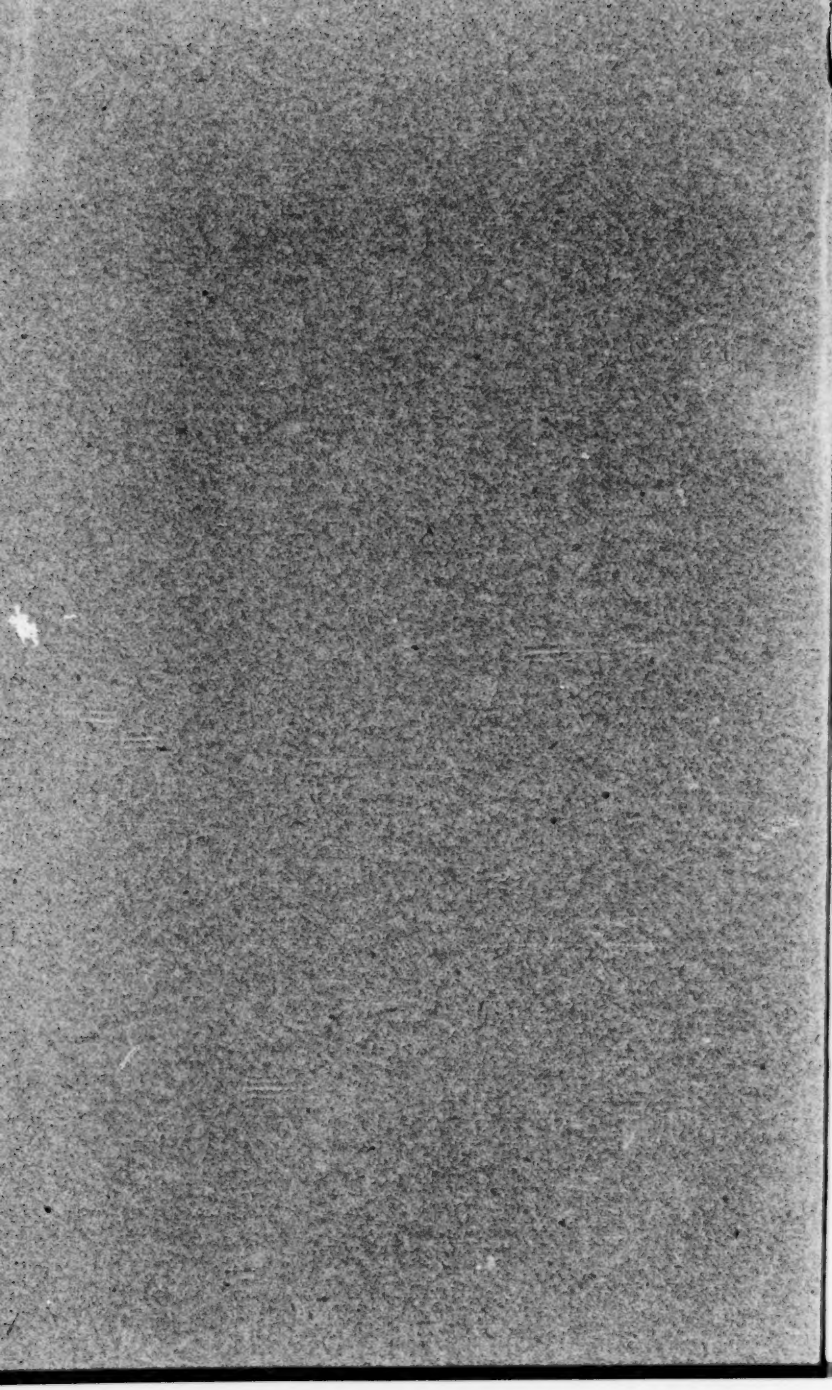
Error to Supreme Court of Illinois.

Motion to Dismiss Writ of Error by Defendant in Error and Brief in Support thereof.

EDWARD C. AKIN,
Attorney General of Illinois.

GEORGE W. SMITH,
FRANK P. BLAIR and
MURRY NELSON, Jr.,
Counsel for Defendant in Error.

The Lakeside Press Printing Company, 33 Harrison St., Chicago.



BLEED THROUGH

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

JOSEPH KIPLEY, Superintendent of Police, ADOLF KRAUS, HEMPSTEAD WASHBURNE and DUDLEY WINSTON, Civil Service Commissioners,
Plaintiffs in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel., EDWARD C. AKIN, Attorney General,
Defendant in Error.

Error to Supreme Court, of Illinois.

And now comes the defendant in error and moves the court that this writ of error be dismissed for the following reasons.

1. Because a Federal question was not involved in the decision of said cause in the Supreme Court of the State of Illinois and did not control the disposition thereof.

2 Because in the decision of said cause in said Supreme Court of Illinois there was not drawn in question the validity of any treaty or statute of, or an authority exercised under, the United States, nor was said decision against the validity of any treaty, statute of, or an authority exercised under the United States.

POOR COPY

3 Because the record does not show that any title, right, privilege or immunity was claimed under the Constitution of the United States, or that the decision was against the title, right, privilege or immunity specially set apart or claimed.

Edward C. Akin
Attorney General of Illinois

George W. Smith
Frank P. Blair
Murry Nelson, Jr.
Counsel for Defendant in Error.

BLEED THROUGH

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1897.

JOSEPH KIPLEY, Superintendent of Police of the City of Chicago, ADOLF KRAUS, HEMPSTEAD WASHBURNE and DUDLEY WINSTON, Civil Service Commissioners,
Plaintiffs in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS, on the relation of EDWARD C. AKIN, Attorney General of the State of Illinois,
Defendant in Error.

Error to Supreme Court of Illinois.

The case arises upon a writ of error sued out to the Supreme Court of the State of Illinois, by Joseph Kipley, one of the respondents to an original petition for mandamus filed in that court by the People of the State of Illinois. On the 22d day of December, 1897, an opinion was filed in the office of the clerk of that court, which was as follows:

POOR COPY

STATEMENT.

At the June term 1897, of this court, to wit: on June 1, 1897, the attorney general filed a motion for leave to file an original petition for mandamus. Leave was granted to file the petition, and it was so filed on June 2, 1897.

The petition prays for summons for Joseph Kipley, superintendent of police of Chicago, and Adolf Kraus, Dudley Winston and Hem stead Washburne, civil service commissioners, requiring them to answer the petition.

The petition alleges that vacan ies exist in the positions of assistant superintendent of police, inspectors of police and captains of police; that such positions have not been filled in accordance with the terms of an "Act to regulate the Civil Service of Cities"; that, upon the occurrence of such vacancies, it was the duty of the superintendent of police, as the head of the department of police of the City of Chicago, to notify the Civil Service Commissioners of said city of such vacancies; that, upon such notification it was the duty of said Commissioners to submit to said superintendent of police the names of not more than three applicants in each grade or class next below the grade or class, in which the vacancy existed, for promotion to such vacancies; that said superintendent of police claims the power to fill vacancies in the positions of assistant superintendent of police, inspectors of police and captains of police, in said city; that, in violation of the provisions of this act, said superintendent has

BLEED THROUGH

assumed to fill some of such vacancies by appointing persons not in the classified lists formulated by said Civil Service Commission, and not designated or selected by said Commission for appointment o promotion; that said superintendent has attempted to appoint one Lyman Lewis, as assistant superintendent of police, and one John J. Harkness, as inspector of police. The petition further alleges the passage of the "Act to regulate the Civil Service of Cities" on March 20, 1895, the adoption of the same by the City of Chicago at the general city election held on April 2, 1895, the proclamation of George B. Swift, then mayor of said city, issued on July 1, 1895, declaring the adoption of said act, and that the same was in full force after the date of said proclamation, the appointment by said Swift, as mayor on July 1, 1895, of three Civil Service Commissioners under said act, to wit: John M. Clark, Robert A. Waller and Christoph Hotz, the qualification of said Commissioners, and the adoption by said Commissioners of certain "Civil Service Rules" which rules are appended as an exhibit to said petition.

The petition further alleges, that, on April 6, 1897, Carter H. Harrison was elected mayor of said city as the successor to said Swift, and qualified as such mayor; that, thereafter, said Waller resigned his position as one of said Civil Service Commissioners, and said Clark and Hotz were removed from said Commission by said Carter H. Harrison, mayor; that the respondents, Winston, Kraus and Washburne, were appointed Commissioners in place of said Clark, Waller and Hotz, and have duly qualified and are acting as such Commissioners.

The petition also alleges that the rules of the first

POOR COPY

Board of Commissioners, which were adopted as aforesaid, have not been altered or changed; that, by such rules, the old Board of Commissioners, in the year 1895, classified the offices of assistant superintendent of police, inspectors of police and captains of police, and thereby brought them within the terms and provisions of said Civil Service Act; that, by an opinion in writing addressed to the mayor and signed by the respondents who constitute the present Board of Commissioners, and promulgated on or about May 22, 1897, the positions of assistant superintendent of police and inspectors of police were held by the present Board of Commissioners not to be required to be classified under said act, and to be exempt from the rules and regulations of said commissioners. The petition also sets forth ordinances of the City of Chicago, showing that before, and at the time of, the passage of the Civil Service Act, there was established an executive department of the municipal government of Chicago, known as the department of police, embracing the superintendent of police, and other officials: that there was created the office of superintendent of police, who should be the head of said department of police, and should hold his office for the term of two years, and until his successor should be appointed and qualified. The ordinances referred to in the petition also provide that said superintendent of police shall be appointed by the mayor, by and with the advice and consent of the city council. It is also alleged in the petition, that, prior to the passage of said Civil Service Act, ordinances had been adopted by the city council of Chicago, relating to the department of public works, the department of health and other departments, by which a head of

BLEED THRO

each department was established in terms similar to the provisions relating to the department of police. The petition represents that on April 15, 1897, the respondent Joseph Kipley, was by Carter H. Harrison, mayor of said city, appointed superintendent of police and was afterwards duly confirmed by the city council, and qualified as such superintendent, and caused the city to be divided, or accepted a division of the said city theretofore made, into four divisions and fifteen districts, and assigned, or recognized as having been assigned, to each division an inspector of police, and to each district, a captain of police.

The petition prays that a writ of mandamus may issue to said Joseph Kipley, as superintendent of police, directing and commanding him to notify the Civil Service Commissioners of vacancies existing in the positions of assistant superintendent of police, inspectors of police and captains of police in said city, and to said Kraus, Winston and Washburne, as such Civil Service Commissioners, commanding them to submit to said Kipley, as such superintendent of police, the names of not more than three applicants for promotion for each vacancy from the grade next below that in which such vacancy or vacancies exist, etc.

On June 14, 1897, the respondent, Kipley filed a separate answer in which, among other things, he set up that the Civil Service Act was unconstitutional and void. The said answer admits, that the present Civil Service Commissioners, on May 22, 1897, promulgated the opinion mentioned in the petition, holding that the positions of assistant superintendent of police and

GH POOR COPY

inspectors of police were not required to be classified under said Civil Service Act, and were exempt from the rules and regulations of said Commissioners. The answer avers, that the true construction of the 3d and 11th sections of said act, if the same have any force or validity, is stated in the opinion of May 22, 1897, a copy of which opinion is annexed to the answer and made a part thereof. The answer also adopts and makes a part thereof a certain opinion dated May 5, 1897, given by Charles S. Thornton, corporation counsel of said city, to the said Carter H. Harrison, mayor, therein holding that said positions of assistant superintendent of police, inspectors of police and captains of police and other subordinate positions in the department of public works, of building, of health, of fire and of police, are not required to be classified under said act, and are exempt from its provisions and from the rules and regulations of the Commissioners. The answer of the respondent Kipley, avers that the said respondent has followed the construction of the provisions of said act, as given in the opinions aforesaid.

The answer further sets up, that the respondent neither admits nor denies, that, by the rules referred to in the petition, the first Board of Civil Service Commissioners for the year 1895 classified the offices of assistant superintendent of police, inspectors of police and captains of police, as stated in the petition, but in his answer, the said Kipley positively denies that the said positions were by said rules or could be brought within the terms and provisions of said Civil Service Act. The answer furthermore admits the existence of the vacancies in the department of police referred to in the petition, and that the said respondent, Kipley,

BLEED THROUGH

has caused the same to be filled. On June 15, 1897, the People, by the attorney general, demurred to the answer of the respondent Kipley.

On June 14, 1897, the respondents, Kraus, Washburne and Winston, Civil Service Commissioners aforesaid, filed their answer to the petition, and filed and annexed thereto a copy of the answer filed by them in another proceeding for mandamus instituted against them as Civil Service Commissioners at the same time, at which the present proceeding was instituted, but to which the said Kipley was not made a party defendant. The said Civil Service Commissioners also adopt as part of their answer, the answer filed herein by said Kipley, except so much of Kipley's answer as attacks the validity and constitutionality of said Civil Service Act. The answer of said Commissioners admits the appointment of Lyman Lewis as assistant superintendent of police, and of John J. Harkness, as inspector of police, by the said Kipley, and alleges that, as said Lewis and Harkness are not made parties to the petition, the petition is defective.

The answer of the respondents Kraus, Winston and Washburne, in the mandamus proceeding, commenced against them alone and without joining Kipley, and which is made a part of their answer in the present proceeding, refers to and indorses and adopts the said opinion promulgated by them and addressed to the mayor on May 22, 1897. The answer of the Commissioners, by the adoption of said opinion, and of their answer in the other proceeding, claims that certain positions in the police, fire and health departments, and in the depart-

POOR COPY

ment of buildings, and of public works, in the City of Chicago, other than the heads of those departments, as mentioned in the ordinances referred to in the petition are not required to be classified under the Civil Service Act, and are exempt from its provisions. The positions claimed by the Commissioners in their answer to be thus exempt and not subject to classification, are in the department of public works, the following positions, to wit: secretary to commissioner of public works, city engineer, superintendent of streets, superintendent of water, superintendent of sewerage, superintendent of special assessments, superintendent of maps; in the department of buildings, secretary to commissioner of buildings, deputy commissioner of buildings; in the department of health, assistant commissioner of health; in the department of police, secretary of the department of police, assistant superintendent of police, inspector of police; in the fire department, first assistant fire marshal, superintendent of city telegraph, fire inspector, secretary of fire department, etc. On June 15, 1897, the People, by the attorney general, filed a demurrer to the answer of the respondents who are Civil Service Commissioners.

Subsequently after the adjournment of this court in the June term, 1897, and on the 28th day of June, A. D. 1897, the City Council of the City of Chicago passed an ordinance entitled "An ordinance to designate certain public officials who shall be selected by the mayor with the concurrence of the council," which ordinance is as follows:

BLEED THROUGH

"Be it ordained by the City Council of the City of Chicago:

Section 1. That the following list of public officials shall be designated as 'heads of principal departments' as said term is used in section 11 of an 'act to regulate civil service of cities,' approved and in full force March 20th, 1895, and shall be nominated by the mayor and shall be confirmed by the city council, viz: city engineer, superintendent of streets, superintendent of water, superintendent of sewerage or sewers, superintendent of special assessments, superintendent of water pipe extension, superintendent of city pipe yards, secretary of police department, assistant superintendent of police, fifteen captains of police, four inspectors of police, chief sidewalk inspector, assessor of the water department, district foreman of street repairs, district foreman of water pipe extension, district foreman of sewer cleaning, district foreman for street cleaning.

Section 2. All ordinances or parts of ordinances inconsistent herewith are hereby repealed.

Section 3. This ordinance shall take effect and be in force from and after its passage." This ordinance was approved by the mayor, Carter H. Harrison, on July 1, 1897.

On July 10th, 1897, the respondent Joseph Kipley superintendent of police, filed a plea in this court, setting up that, since the filing of his answer to the petition herein and since the last adjournment of the court, the city council of Chicago had adopted the said ordinance of June 28th, 1897. The plea then sets forth said last mentioned ordinance in full, and alleges

POOR COPY

that the same is in full force and effect, and that thereby the respondents' failure to notify said Civil Service Commissioners and to submit to them the appointment of certain subordinate police officers of said city have been, if they ever were within the same, wholly taken away from and removed out of the control, jurisdiction and power of the said Civil Service Commissioners and that such matters are now expressly excepted by the terms of said ordinance from the force and effect of the Civil Service Act. The plea then quotes in full sections 3 and 11 of said act, and submits said last named ordinance to the court to be read and construed in view of said sections. On October 18th, 1897, the attorney general filed a demurrer to said plea.

OPINION BY MAGRUDER, J.

First. The Civil Service Commissioners who are respondents in this case, do not set up in their answer the unconstitutionality of the Civil Service Act, nor do they adopt that part of the answer of the respondent Kipley, the superintendent of police, which attacks the constitutionality of the law. But the respondent, Kipley, in his answer, expressly alleges, that the act is unconstitutional, and relies upon its unconstitutionality as a defense to the matters and things set up in the petition. By the demurrer filed by the petitioner to the answer of Kipley, the question of the constitutionality of the law is directly raised. The plea filed on July 10th, 1897, setting up the ordinance of June 28th, 1897, is a plea *puis darrein continuance.* That plea relies upon the ordinance of June 28th, 1897, as a

BLEED THROUG

defense, and, under the technical rules applicable to such a plea, it may be that the defenses set up in the answer of Kipley are superseded and the substantive averments of the petition confessed It has been held that, where a plea *puis darrein continuance* is filed, everything is confessed except the matter contested by the plea. (City of East St. Louis v. Renshaw, 153 Ill., 491.) In this view it would seem to follow that the question of the constiutionality of the law, as raised in the answer of Kipley, has been waived by the filing of the plea *puis*. Counsel for the respondent Kipley, insists that in an original proceeding by mandamus in this court, the question of the constitutionality of the act can be raised at any time before the issuance of the peremptory writ, irrespective of the filing of the plea *puis darrein continuance*.

He contends that the court will not in such a proceeding enforce by mandamus an unconstitutional law, if, at any time in the progress of the proceedings such unconstitutionality is made apparent and is brought to the attention of the court. This contention receives some support from the following remark made by this court in People v. Town of Mt. Morris, 145 Ill., 427: "It has been held that defects in substance in the petition may be taken advantage of at any time before granting the peremptory writ." Without determining, however, whether the contention thus made by counsel is absolutely correct or not, we deem it proper to dispose of the question of the constitutionality of the act, in view of the fact that the counsel for the respondent Kipley, furnishes us with an elaborate argument against its constitutionality, and the

POOR COPY

petitioner, and the respondents, who are Civil Service Commissioners, present equally elaborate arguments in favor of its constitutionality. The subject is thus urged upon our attention by all the parties to this controversy.

The Civil Service Act passed by the legislature of this state on March 20th, 1895, is not the first law of its kind which has appeared in this country. Such a law has been passed by the Congress of the United States to be applied to the Civil Service under the Federal government. Statutes of the same kind have also been adopted in the States of Massachusetts and New York. The Civil Service Law, which was in force in the State of New York for more than ten years before the year 1894, had so commended itself to popular approval, and had been so beneficent in its results, that its underlying principle was embodied in the new or amended and revised constitution of that state, adopted by the people in 1894, and which went into effect on January 1st, 1895.

The provision upon this subject in the New York Constitution of 1894 is as follows: "Appointments and promotions in the Civil Service of the state and in all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations, which so far as practicable, shall be competitive * * * Laws shall be made to provide for the enforcement of this section."

The evils sought to be remedied by legislation of this character, are well known and well understood. These evils are such as grow out of what is generally

BLEED THROUGH

called the "spoils system" in the matter of appointments to public office. This system rests upon what Mr. Justice Peckham, now of the Supreme Court of the United States, then a member of the Court of Appeals of the State of New York, speaking for the latter court in Rogers v. Common Council of Buffalo, 123 N. Y., 173, calls "the semi-barbarous maxim, that to the victor belong the spoils." Under the system thus designated as the "spoils system," party service and party fealty are made the tests for appointments to office. Wherever this system prevails, political work, done by the applicant, and his supposed power to do more, are regarded as the chief reasons for his appointment to office. Public office is thus made to be the reward for political work. All the offices are "parcelled out by the chiefs of the victorious party to the faithful followers in recognition of past political services, or in expectation of future support of the same nature. Possession of office, under such a system, is to be the reward of party fidelity and party service." (Rogers v. Common Council, of Buffalo, *supra.*) Where an appointment is made under the system in question, the officer making it is apt to ignore any sense of personal or official responsibility to the people, and to substitute in its stead a feeling of responsibliity to his party only. The appointments to offices are such as the leading men therein choose to ask for. (Rogers v. Common Council of Buffalo, *supra.*) Where Civil Service laws have been adopted, they have been so adopted for the purpose of doing away with the evils which necessarily result from "the spoils system." Those evils have been fitly characterized as inefficiency, extravagance, the interruption of public busi-

POOR COPY

ness by place hunters, corruption of the electoral franchise, and political assessments. A distinguished writer on the Constitutional History of the United States has spoken of the maxim "to the victor belong the spoils being an inviolable principle of American politicians," and he says: "It is owing only to the astonishing vitality of the people of the United States and to the altogether unsurpassed and unsurpassable favor of their natural conditions, that the state has not succumbed under the onerous burden of the curse. (2 Von Holst, Const. Hist. of U. S., 26.) To do away with the onerous burden of this curse in the cities of Illinois, the Act of March 20th, 1895, was passed by the legislature of this state.

The foundation principles of the act are, that appointments to municipal offices or employments must be made according to merit and fitness, to be ascertained by competitive examinations, free to all; and that promotions from lower to higher grades in the public service must be made upon the basis of merit. That this is so, will appear from the examination of the various provisions of the act. Section 3 of the act provides for the classification of all the offices and places of employment in any city, which has adopted the Act, with reference to the examinations therein provided for, with certain exceptions; and that the offices and places, so classified by the Civil Service Commission, shall constitute the classified Civil Service of the city. Section 6 provides, that all applicants for offices or places in such classified service with certain exceptions, shall be subjected to examinations which shall be public, competitive and free to all citizens of the United States, with specified limita-

BLEED THROUGH

tions as to residence, age, health, habits and moral character; that such examinations shall be practical in their character, and shall relate to those matters, which will fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed, and shall include tests of physical qualifications and health, and when appropriate of manual skill; that no questions in any examination shall relate to political or religious opinions or affiliations. Section 8 provides that from these examinations, the Commission shall prepare a register for each grade or class of positions in the classified service of the city of the persons, whose general average standing, upon examination for such grade or class is not less than the minimum fixed by the rules of such commission, and who are otherwise eligible, and that such persons shall take rank upon the register as candidates in the order of their relative excellence as determined by examination, without reference to priority of time of examination. Section 9 provides, that the Commission shall, by its rules, provide for promotions in such classified service, on the basis of ascertained merit and seniority in service and examination, and shall provide, "in all cases where it is practicable," that vacancies shall be filled by promotion; that all examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examination; that it shall be the duty of the Commission to submit to the appointing power the names of not more than three applicants for each promotion having the highest rating. Section 10 provides that "the head of the department" or office, in which a position classi-

POOR COPY

fied under this act is to be filled, shall notify said Commission of that fact, and said Commission shall certify to the appointing officer the name and address of the candidate standing highest upon the register for the class or grade to which said position belongs, with a certain exception in regard to laborers; that the appointing officer shall notify the Commission of each position to be filled separately, and shall fill such place by the appointment of the person certified to him by said Commission therefor, etc. Section 34 provides that any person who shall willfully or through culpable negligence, violate any of the provisions of this act, or any rule promulgated in accordance with the provisions thereof, shall be guilty of a misdemeanor, and, shall, upon conviction thereof, be punished by a fine of not less than fifty dollars and not exceeding one thousand dollars or by imprisonment in the county jail for a term not exceeding six months; or both such fine and imprisonment in the discretion of the court.

In 1884 the State of Massachusetts passed a Civil Service Act, whose general provisions are substantially the same as those of the Illinois Act, now under consideration. The Supreme Court of Massachusetts being requested by the House of Representatives of that state to give their opinion upon the constitutionality of certain provisions of the act, held that the legislature has the constitutional right to provide for the appointment of Civil Service Commissioners, and to delegate them the power to make rules, not inconsistent with existing laws, to guide and control their discretion, and the discretion of the officers of the cities in whom the appointing power is vested; that the duty of determining and ascertaining the qualifications of such

BLEED THROUGH

officers and servants cannot be performed directly by the legislature, but must be delegated to certain officers or agents; that it is not a delegation of power to enact laws, but merely a delegation of administrative power and duties; that there was no provision of the constitution which prevented the legislature from enacting that such rules, when duly made, should be binding upon the officers and citizens to whom they apply, and that they might be enforced by suitable penalties; that the power of the legislature to make or to authorize local laws for the administration of local affairs was beyond question. (Opinion of Justices, 138 Mass. Rep., 601.)

In 1883, the legislature of the State of New York passed a Civil Service Law, which is similar in most of its features to the Illinois Act. In Rogers v. Common Council of Buffalo, *supra*, it was held, that the provision of the act, which creates a board of commissioners consisting of two or more persons, and which provides that not more than a certain proportion shall be taken from one party, does not amount to an arbitrary exclusion from office, or to a general regulation requiring qualifications not mentioned in the state constitution, and is not unconstitutional: and that a provision therein, which required an applicant for appointment to a position in a public office, to show his fitness therefor, was not an illegal test within the meaning of the constitution.

In the course of the opinion delivered by Mr. Justice PECKHAM in the latter case, he says: "Looking at it as a matter of common sense, we are quite sure that the framers of our organic law never intended to oppose a constitutional barrier to the right of the people

POOR COPY

through their legislature to enact laws, which would have for their sole object the possession of fit and proper qualifications for the performance of the duties of a public office on the part of him who desired to be appointed to such office so long as the means adopted to accomplish such end are appropriate therefor they must be within the legislative power. The idea cannot be entertained for one moment, that an intelligent people would have consented to so bind themselves with the constitutional restrictions on the power of their own representatives, as to prevent the adoption of any means by which to secure, if possible, honest and intelligent service in public office. * * * Statutes looking only to the purpose of ascertaining whether candidates for an appointive office are possessed of those qualifications, which are necessary for a fit and intelligent discharge of the duties pertaining to such office, are not dangerous in their nature, and in their execution, they are not liable to abuse in any manner involving the liberties of the people."

The Illlinois Act contains a similar provision to that in the New York Act, namely: that no more than two members of the Civil Service shall, at the time of appointment, be members of the same political party. Section 31 of the Illinois Act provides that no comptroller, or, other auditing officer of a city which has adopted the act, shall approve the payment of, or be in any manner concerned in paying any salary or wages to any person for services as an officer or employe of such city, unless such person is occupying an office or place of employment according to the provisions of law, and is entitled to payment therefor. Section 32 provides that no paymaster, treasurer or

BLEED THROU

other officer or agent of a .ity which has adopted the act shall willfully pay, or be in any manner concerned in payin any person any salary or wages for services as an officer or employe of such city, unless such person is occupying an office or place of employment according to the provisions of law, and is entitled to payment therefor.

The New York Act provided, that clerks and other subordinates in the Civil Service of the state should be appointed or selected from the lists produced, as therein provided, after competitive examinations, and that it should be unlawful for the comptroller to pay the compensation of any clerk in the Civil Service, who had not been appointed pursuant to the provisions of the law, and whose name had not been certified to him by the Civil Service Commission. In People v. Roberts, 148 N. Y., 360, the facts showed that the relator was appointed to a certain position without having passed the Civil Service Examination, and that his name had never been certified to the comptroller by the ivil Service Commission, and that for that reason the comptroller refused to pay the claim. It was there held, that the relator was not entitled to a mandamus to compel the comptroller to pay him the salary attached to such position in the absence of a certificate from the Civil Service Commission that he had been duly appointed pursuant to the Civil Service Act; and the act was there held to be constitutional, the court saying: "The power of the legislature to enact the law, as it appears on the statute books has never been doubted or questioned." Again, in Chittenden v. Wurster, 152 N. Y., 345, which was an action brought by taxpayers of the City of Brooklyn to enjoin the

GH POOR COPY

fiscal officers of the city from paying the salary earned by them to certain employes, who were appointed to their positions without competitive examinations, it was held that the New York Act, with the exception of a provision which exempted certain soldiers and sailors from competitive examinations where the compensation did not exceed $4 per day, was not repugnant to the Constitution of the state. (See, also, Peck v. Belknap, 130 N. Y., 391; matter of Keymer, 148 N. Y., 219.)

The act passed by the legislature of Illinois on March 20, 1895, is not unconstitutional in requiring examinations as therein provided for, as tests for appointments to public office, nor in requiring promotions to be made in the manner therein specified, nor in attaching a penalty to the violation of the provisions of the act. The act does not delegate legislative power to the Civil Service Commissioners by authorizing them to make the rules therein provided for. In this state, when the General Assembly creates a municipal government, it has the power to provide the manner of filling the offices of such government. The legislature may select any means for the administration of the municipal government which it thinks best adapted to that end.

It may provide for the election of municipal officers by the people or may authorize any officers or persons to fill the offices by appointment. (People v. Morgan, 90 Ill., 558.) It has, therefore, the right to enact a law which provides that appointments to municipal offices or positions shall be made according to merit and fitness, and that such merit and fitness must be

BLEED THROUGH

ascertained by competitive examination. In most instances before the passage of the Civil Service Act, the municipal officers, having the power to make appointments to office, removed their appointees at their own pleasure. It is certainly not a violation of the organic law to require them to conform to and obey regulations, which make merit and fitness the necessary qualifications for office. It is contended, however, by counsel for the respondent Kipley, that the act is unconstitutional and void upon the alleged ground, that it delegates to the Civil Service Commissioners the exercise of judicial functions. This contention rests upon the character of the provisions contained in sections 12, 14 and 33 of the act. Section 12 provides, that no officer or employe in the classified Civil Service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause upon written charges and after an opportunity to be heard in his own defense; that such charges shall be investigated by or before said Civil Service Commission, or by or before some officer or board appointed by said Commission, to conduct such investigation; that the finding and decision of such Commission or investigating officer or board, when approved by said Commission, shall be forthwith enforced by such officer; that in the course of an investigation of charges, each member of the Commission, and of any board so appointed by it, and any officer so appointed, shall have the power to administer oaths, and shall have power to secure by its subpœna both the attendance and testimony of witnesses, and the production of books and papers relevant to such investigation. Section 14 provides, that

POOR COPY

the Commission shall investigate the enforcement of the act and of its rules, and the action of the examiners therein provided for, and the conduct and action of the appointees in the classified service in its city, and may inquire as to the nature, tenure and compensation of all offices and places in the public service thereof; and that in the course of such investigations each Commissioner shall have the power to administer oaths, and said commission shall have the power to secure by its subpœna both the attendance and testimony of witnesses, and the production of books and papers relevant to such investigations. Section 33 provides, that any person who shall be served with a subpœna to appear and testify or to produce books and papers, etc., under the orders of the Commission in the course of such investigation above specified, and who shall refuse or neglect to appear or to testify, or to produce books and papers relevant to said investigation, as commanded in such subpœna, shall be guilty of a misdemeanor, and shall, on conviction, be punished as provided in section 34, which has already been referred to; that any Circuit Court of this state, or any judge thereof, either in term time or vacation, upon application of any such Commissioner, or officer, or board, may, in his discretion, compel the attendance of witnesses, the production of books and papers, and giving of testimony before the Commission, etc., by attachment for contempt, or otherwise, in the same manner as the production of evidence may be compelled before said court.

We regard the question of the constitutionality of the act, so far as its constitutionality is attacked upon the ground that there is a supposed delegation of

BLEED THROUGH

judicial functions to the Civil Service Commissioners as settled by the case of Interstate Commerce Commission v. Brimson, 154 U. S., 447. The twelfth section of the act provided that the Interstate Commerce Commission should have power to require by subpœna the attendance and testimony of witnesses and the production of books etc., relating to any matter under investigation; that in case of disobedience to a subpœna, the Commission might invoke the aid of any Circuit Court of the United States in requiring that attendance and testimony of witnesses, and the production of books and papers and documents under the provisions of said section; that any of the Circuit Courts of the United States, within jurisdiction of which such inquiry was carried on, might, in case of refusal to obey a subpœna issued to any common carrier, subject to the provisions of the act, or other persons, issue an order requiring such common carrier or other person to appear before said Commission and produce books and papers, if so ordered, and give evidence touching the matter in question; and that any failure to obey such order of the court might be punished by such court as a contempt thereof. In the Brimson case, *supra*, it was held that the provisions of said twelfth section, as above set forth, were not in conflict with the Constitution of the United States, that the party subpœnaed to testify or to produce books and papers, was bound to obey the subpœna, if the testimony sought, and the books and papers called for, related to a matter under investigation which the Commission was legally entitled to investigate. The Constitution of the United States provides that "the judicial power shall extend to all cases in law and equity arising under the Con-

POOR COPY

stitution, the laws of the United States and treaties made, or which shall be made their authority * * * to controversies to which the United States shall be a party," etc. In that case, the Supreme Court of the United States held, that the issue, made before the Circuit Court upon the application of the Commission for an order to compel the giving of testimony or the production of books and papers, was a "case" or controversy within the meaning of the Federal Constitution, which authorized the Circuit Court to act; and that the judgment of the Circuit Court rendered in pursuance of such applications was none the less judicial in its character, because the effect of it was to aid an administrative body in the performance of the duties legally imposed upon it by Congress in execution of a power granted by the constitution. As we understand the Brimson case, it also holds that where an act of Congress made the refusal of a witness duly summoned to appear and testify before the Commission in respect to a matter rightfully committed to that body for examination, an offense against the United States, punishable by fine or imprisonment, or both, a criminal prosecution, or a proceeding by information, could be instituted against the party who had committed such offense.

The Constitution of Illinois (Art. 61, Sec. 12) provides that "the Circuit Courts shall have original jurisdiction of all causes in law and equity," etc.

In the Civil Service Act, the Commission is authorized to subpœna witnesses to testify and to produce books and papers in the investigation of a matter which is clearly within their power to investigate

BLEED THROUGH

for the reasons already stated. This being so, upon the refusal of the witness to obey the subpœna, the application of the Commission to the Circuit Court for an order requiring such persons so to appear before the Commission and give evidence or produce books and papers, would constitute such a case as would authorize the Circuit Court to act. The judicial function is performed by the court, and not the Commission. The Commission is not authorized to punish the party for contempt, but the Circuit Court, upon the application of the Commission, makes the order to produce the papers and upon failure to obey the order; inflicts the punishment as for a contempt. There is here no delegation of the judicial functions to the Commission, but simply a provision for the exercise of judicial functions by the Circuit Court.

The views here advanced do not conflict with the decision of this court in Puterbaugh v. Smith, 131 Ill., 199, which latter case was decided before this question was passed upon by the Supreme Court of the United States in Interstate Commerce Commission v. Brimson, *supra*. It was held in the Puterbaugh case, that so much of a certain act entitled "Evidence" as authorized a judge in vacation to punish in a summary manner by fine and imprisonment, or fine or imprisonment, a person, who should refuse to obey a subpœna of a notary public to appear and have his deposition taken, or to subscribe his name to a deposition, was unconstitutional; but the decision in that case was placed upon the ground, that the witness there merely acted in contempt of the notary's authority and not in contempt of the authority of the Circuit Court. Here, however, the Civil Service Act does not provide

POOR COPY

for punishment of the party for failing to obey the subpœna of the Commission, but for failing to obey the order made by the Circuit Court. When the application is made by the Commission or Commissioners, the court is authorized to compel the attendance of witnesses, by attachment for contempt or otherwise, "in the same manner as the production of evidence may be compelled before said court."

The orderly course of the proceeding would require, that an order should be made requiring the witness to testify, and that it should appear that the witness refused to obey said order before the punishment for contempt could be inflicted upon him. The phraseology of section 33 involves the making of such order as a preliminary step, before the punishment is inflicted. We are of the opinion, that the act is not unconstitutional as delegating judicial power to the Commission but even if the provision authorizing them to make application to the Circuit Court in the manner stated, was unconstitutional it would not necessarily follow that the whole act should fall because of such unconstitutional provision. Where one provision in an act is in conflict with the Constitution, but is so independent of other provisions that, without it, the latter are complete and fully capable of execution, the act will be construed the same as if the void part had never been inserted. (Dupee v. Swigert, 127 Ill., 494.)

It is claimed by counsel for the respondent Kipley, that the law is unconstitutional, as violating those sections of the constitution which secure the right of trial by jury. The right of trial by jury is not violated by the provisions of the Civil Service Act, which pro-

BLEED THROUGH

vide for the summoning of witnesses, and the requiring of such witnesses to testify, and to produce books papers, etc., and which further provide, that in the event of their failure to obey the order of the court in this regard, they shall be punished for contempt. The issue presented by these provisions is not one for the determination of a jury. It is an issue of law exclusively, and not of fact. In matters of contempt, a jury is not required by due process of law. (Interstate Commerce Commission v. Brimson, *supra*; Application of Clark, 65 Conn., 171.)

Counsel also contends that section 12, which provides for the trial of charges against appointees violates the constitutional right of trial by jury. This is said to be so, upon the alleged ground that the office, from which the officer or employe is to be removed, or discharged in case the charges presented against him are sustained, is with its attending emoluments, the property of the office holder; and that no man can be deprived of his property without a trial by a jury of his peers. This position is wholly untenable. A public office is not property, nor are the prospective fees of an office the property of its incumbent. An office is a mere right to exercise a public function or employment. It is not the subject of sale, purchase or incumbrance. The term "office" implies a delegation of a portion of the sovereign power of the government to the person filling the office. Its duties are to be performed for the benefit of the public and in the public interest. (19 Am. & Eng. Enc. of Law, 381, 382).

In Donahue v. County of Will, 100 Ill., 94, it was held that a law which authorized county boards to remove county treasure s from office for certain violation

POOR COPY

of their duties, was not unconstitutional; that the removal of an official from office was not a judicial act and in that case, could be performed by the county board. In the Donahue case, *supra*, the contention that, under the constitutional provision prohibiting any person to be deprived of his property without process of law, a county treasurer could only be deprived of his office by a trial and judgment in a court of law, was held to be wholly untenable. We there said: "It is impossible to conceive how, under our form of goverment, a person can own or have a title to a government office. Officers are created for the administration of public affairs. When a person is inducted into an office, he thereby becomes empowered to exercise its powers and perform its duties, not for his, but for the public benefit. It would be a misnomer and a perversion to say that an incumbent owned an office or had any title to it."

In The State v. Hawkins, 44 Ohio St., 98, the Supreme Court of Ohio said: "The incumbent of an office has not, under our system of government, any property in it. His right to exercise it is not based upon any contract or grant. It is conferred on him as a public trust to be exercised for the benefit of the public." If the removal of a county official for cause does not involve the exercise of judicial power, then certainly the removal of a municipal officer is not the exercise of judicial power. (State v. Hawkins, *supra.*)

The legislature has the power to control the municipalities created by it. Such municipalities must look to the state for such charters of government as the legislature shall see fit to provide; and, while they have a right to manage their own local concerns and

BLEED THROUG

choose their own administrative and police officers, yet this right is subject to such exceptions as the legislative power of the state may see fit to make. (Cooley on Const. Lim., 6 Ed., pp. 203 *n*, 227, 231.) Therefore, the legislature may direct how municipal officers shall be elected or appointed by the cities and villages in the state, and how such officers may be removed. Moreover, the provisions of the Civil Service Act for the removal or discharge of officers or employes upon written charges are purely statutory provisions. The constitutional provision, that " the right of trial by jury as heretofore enjoyed, shall remain inviolate," was not intended to introduce the right of trial by jury into special summary jurisdictions unknown to the common law, and not providing for that mode of trial. (People v. Hill, 163 Ill., 186.)

It is further claimed that the law is unconstitutional as being special legislation. This contention also is without force, as the law itself provides for its operation only in those cities, which by a vote of the people may adopt it. Laws of this character are not obnoxious to the constitutional inhibition against special legislation. (People v. Hoffman, 116 Ill., 601.) The present law has been adopted by the people of the City of Chicago.

Counsel for respondent Kipley, also contends that section 35 of the act is unconstitutional. Section 35 provides that " if any person shall be convicted under the next preceding section, any public office or place of public employment, which such person may hold, shall, by force of such conviction, be rendered vacant, and such person shall be incapable of holding any office or place of public employment for the period of

POOR COPY

five years from the date of such conviction." We are inclined to agree with counsel, that the portion of this section, which makes the person therein referred to incapable of holding any office or place of public employment for the period of five years from the date of his conviction, is unconstitutional.

Section 8 of article 2 of the constitution of this state provides, that " no person shall be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment otherwise than in the penitentiary," etc. The act seems to contemplate prosecutions for the violations of its provisions. No person can be held to answer for any crime, for which an infamous punishment may be imposed without presentment or indictment by a grand jury. a crime which subjects the party to a disqualification to hold office in case he is convicted of such crime, is an infamous crime. Disqualification from holding office, if inflicted as a punishment for crime, is an infamous punishment. (Ex parte Wilson, 114 U. S., 417.)

Here, section 35 of the act provides for punishing the party guilty of violating its provisions by disqualifying him from holding office. This is not a punishment by fine or imprisonment, otherwise than in the penitentiary, and is in addition to such punishment by fine or imprisonment in the county jail, or by both fine and imprisonment, as is specified, in section 34. So far, therefore, as the act provides for the infliction of punishment by a disqualification to hold office, where the prosecution is by information and not by indictment, it is in violation of section 8 of article 2 of the constitu-

BLEED THROU

tion. It is true that section 35 provides that such disqualification shall only be for five years from the date of the conviction, but, as counsel have furnished us with no authority in favor of the position that a limitation of the disqualification to a period of five years is different from a disqualification where no such limitation had been fixed, and has presented us in the briefs with no reasons or arguments upon the subject, we assume that the disqualification for a limited period is as much an infamous punishment as though it was not subject to any such limitation. But the obnoxious feature, which thus exists in section 35, may be eliminated from the act without invalidating its other provisions. With the exception thus indicated, our conclusion is, that the act is not unconstitutional in any of the respects heretofore mentioned, and which have been called to our attention by counsel for the respondent Kipley.

Second. The demurrers of the petitioner to the answers and plea raise a further question as to the proper construction of certain provisions of the Civil Service Act. Section 3 of the act provides that " said Commissioners shall classify all the offices and places of employment in such city, with reference to the examinations hereinafter provided for, except those offices and places mentioned in section 11 of this act. The offices and places so classified by the Commission shall constitute the classified Civil Service of such city, and no appointments to any of such offices or places shall be made except under and according to the rules hereinafter mentioned." Section 6 provides that all applicants for offices in said classified service, except those mentioned in section 11, shall be sub-

H POOR COPY

jected to examination," etc. The plain meaning of this section is, that the offices and places mentioned in section 11 are not to be classified under the act, and are excepted out of the operation of the provisions of the act. Section 11, which thus designates the officers excepted from the classified service is as follows: "Officers who are elected by the people, or who are elected by the city council pursuant to the city charter or whose appointment is subject to confirmation by the city council, judges and clerks of election, members of any board of education, the superintendent and teachers of schools, heads of any principal department of the city, members of the law department, and one private secretary of the mayor, shall not be included in such classified service."

The present controversy arises out of a difference of opinion between the petitioner and the respondents as to the meaning of the two clauses: "Whose appointment is subject to confirmation by the city council," and, "heads of any principal department of the city." Under ordinances existing at the time of the passage of the Civil Service Act, certain departments of the municipal government of the City of Chicago, known as the department of police, the fire department, the department of health, the department of public works, the department of buildings, and the department of law, were in existence and in operation, having been created and established by such ordinances. By the terms of such ordinances, and in pursuance of a practice which existed for many years, each of these departments had one head, and each of these heads was appointed by the mayor by and with the advice and consent of the city council. Thus, the ordinance

BLEED THRO

in regard to the police provides as follows: "There is hereby created the office of superintendent of police who shall be the head of said department of police. The fire ordinance provides as follows: "There is hereby created the office of fire marshal, who shall be the head of the fire department." The health ordinance provides as follows: "There is hereby created the office of commissioner of health, who shall be the head of said department of health." The ordinance in regard to public works provides as follows: "There is hereby created the office of commissioner of public works, who shall be the head of the department of public works." The ordinance in regard to buildings provides as follows: "There is hereby created the office of commissioner of buildings, who shall be the head of said department of buildings." The ordinance in regard to law provides as follows: "There is hereby created the office of corporation counsel, who shall be the head of the law department."

These ordinances further provide, that there shall be certain subordinates or assistants for each of these departments, who are specifically named in the ordinance. By the terms of the ordinances, all of these subordinates or assistants, with a few exceptions, to be hereinafter mentioned, were appointed in each department by the head of that department, either subject to the approval and consent of the mayor, or without such approval or consent. Thus, the ordinance in regard to police provides as follows: "There is hereby established an executive department of the municipal government of the City of Chicago, which shall be known as the department of police, and shall

GH POOR COPY

embrace the superintendent of police, an assistant superintendent of police, a secretary of the department of police, a secretary to said superintendent, one inspector of police for each police division, one captain of police for each police district, and such number of lieutenants, sergeants, detective sergeants, sergeants of detectives, desk sergeants, patrol men, clerks, photographers, telegraphers and veterinary surgeons as has been or may be prescribed by ordinances."

The contention of the petitioner is, that the expression, "heads of any principal department of the city", as those words are used in section 11, means when the act is applied to the City of Chicago, the following officers, to wit: the superintendent of police, the fire marshal, the commissioner of health, the commissioner of public works, the commissioner of buildings, and the corporation counsel. On the contrary, the respondents who are Civil Service Commissioners, contend that the words "head of any principal department of the city" mean, not only the said officials who are designated as heads in the ordinances, but also certain subordinates or assistants named in the ordinances. For instance, in the present case, it is contended by the Civil Service Commissioners, that the assistant superintendent of police, the secretary of the department of police, and the inspectors of police, must be regarded as heads of the police department. The respondent Kipley, further contends that the captains of police shall be regarded as heads of the police department. The same contention is made in regard to certain of the subordinates and assistants in the other departments above named.

BLEED THROUGH

Therefore, the question which is to be determined in this branch of the case is this: what was the meaning of the legislature when it provided in section 11, that "heads of any principal department of the city" should not be included in the classified service? The practice which has prevailed under a constitution or a statute for a long series of years unchallenged and unquestioned, can be resorted to as affording strong evidence of the meaning of any phrase or term used in such constitution or statute. (Bunn v. The People, 45 Ill., 397; Opinion the Justices, 138 Mass., 601.)

In determining the meaning of a statute, a court will have regard to existing circumstances, or contemporaneous conditions, and also to the objects sought to be obtained by the statute, and the necessity or want of necessity for its adoption. (Hawes v. City of Chicago, 158 Ill., 653.) It is conceded by counsel on both sides in their arguments, that the legislature passed the Civil Service Act with full knowledge of the ordinances of the City of Chicago, which designated each of the officers already named as the head of each department above mentioned The opinion of the corporation counsel, which is made part of the answer of the respondent Kipley, makes the following statement: "We find no difficulty in passing upon the question as to what are principal departments in the service of this city, as the ordinances of the city provide for such departments. They are the departments of public works, buildings, fire, health and police." The respondents, who are Civil Service Commissioners, by adopting the answer of the respondent Kipley, also adopt the statement as to what are the principal departments of the city. It is also admitted

POOR COPY

in the argument of counsel, that the appointment of all of the six officers above named is made subject to the approval of the city council. It is also conceded by counsel for the Civil Service Commissioners, that the word "heads" as used in section 11, should be given the meaning which it had at the time of the passage of the Civil Service Act.

The word "department" has a well understood meaning, and had been used in prior statutes, and in the city and village act itself at the time when the Civil Service Act was passed. Thus in section 3 of article 7 of the city and village act, the following words are used to wit: "Neither the city council nor the board of trustees, nor any department or officer of the corporation," etc.; in section 17 of the same article the city comptroller is authorized to require of all officers a statement of the condition and expenses of their respective offices or "departments"; section 2 of the act in regard to the police and firemen's relief fund, provides, that "The superintendent or chief officer of the police department, the fire marshal or chief officer of the fire department," and other officials, shall constitute the board therein named; so, also, in the act of 1887 in regard to the police pension fund, section 2 speaks of the "superintendent or chief officer of the police department." (1 Starr & Cur. Stat., 2 Ed., pp. 727, 731, 835, 838.) There can be no doubt that the words as used in section 11 were intended by the legislature to refer to heads of the principal departments, as they existed under ordinances then in force. At that time there was no principal department of the city government of the City of Chicago, which had more than one head. Each department had a single

BLEED THROUGH

head. Counsel say that, in the clause "heads of any principal department of the city," the word "heads" is plural, and the words "any department" are singular and that, therefore, the legislature must have contemplated that there should be two or more heads in one department. In pursuance of this construction it is then contended that certain subordinate officers in each department, such as the assistant superintendent of police, the secretary of the police department, each police inspector and each captain of police may be regarded as one of the heads of the department of police. If it be true that, when the Civil Service Act was passed each principal department had only one head, and if it be also true, as is admitted, that the legislature had full knowledge of the ordinance giving one head to each principal department, then the legislature must have intended to refer to each single head of each principal department by the words used in section 11. If the legislature meant that only heads of a department should be excluded from the classified service, then, where a department had only one head, such single head would not be excluded. Such a construction cannot be accepted as correct. The intention evidently was, that the head or heads of any principal department should be excepted.

If there was only one head, such single head should be excepted; if there were two or more heads, they should be excepted. It might be that the legislature could or would create some department besides and outside of those existing at the time of the passage of the act, which should consist of several persons as heads, instead of one person. In such case, such heads would come within the meaning of section 11.

POOR COPY

But, so far as the City of Chicago is concerned, the departments at the time of the passage of the act had each only one head, and, therefore, the words used in section 11 must refer to such heads as then existed. In section 10 immediately preceding section 11, the legislature three times makes use of the expression "head of the department," or "the head of any department," making use of the singular number. Section 10 provides that "the head of the department," etc., shall notify the Commission of a vacancy. Therein "the head of the department" is authorized, under certain circumstances, with the consent of the Commission, to discharge a candidate. Therein, also, "the head of any department" is authorized under certain circumstances with the approval of the Commission, to make a temporary appointment. Section 10 also refers to "the "head of the department" as the appointing officer This feature of section 10 corresponds with the ordinances referred to, which make, "the head" of each one of the six departments above referred to the appointing officer of most of the subordinates in his department, with a certain limited number of exceptions. It cannot be that after the use in section 10 of the expressions which refer to one single head of a department, the legislature intended a different meaning, by the use of the words contained in section 11. The expression there used is merely a pluralizing of the expression used in section 10, so as to convey the idea that, where there were several departments, and one head in each department, there were heads of departments. The construction contended for by counsel as to the meaning of the words, "heads of any department of the city," would not only destroy and nullify

BLEED THROUGH

the Civil Service Act itself, but would lead to confusion and uncertainty in its interpretation. If the expression "heads of any principal department" is not to be interpreted to have the meaning given to it in the ordinances in force when the act was passed, what rule of interpretation is to be adopted in determining who are the heads of any principal department, and how many heads there shall be? Counsel say that it must be determined who are heads by applying certain tests. It is said that where an employe is authorized to exercise control in the absence of the chief officer of the department, such employe ought to be considered a head. There is nothing in the act which justifies the application of any such rule, in order to determine who are the heads. It is also said, that where an employe has charge of the hiring and employing of a large number of men, and the expenditure of large sums of money and is to be appointed only with the mayor's concurrence, and whose position is next to that of the chief of the whole department, such an employe must be considered a head of the division or department under his supervision.

There is nothing in the act, which justifies the application of any such test as is thus indicated. It is also said, that where any employe has confidential and business relations with the chief officers in any branch of the city service, he is to be deemed a head. This test also is without sanction in any of the terms of the act. All these tests ignore the fact that the "heads" referred to must be the heads of "any principal department" not a head of a division, or a department under the supervision of a subordinate. The "principal departments" are limited in number, being

POOR COPY

either six departments or seven departments, if the department of finance is included, and each of such departments, as has been already stated, has only one head.

If the construction contended for by counsel is correct, then, when section 10 authorizes "the head of the department" to notify the commission of a vacancy which one of such heads is to give such notice? and why is not the direction that "the heads of the department" should give the notice, instead of the direction that "the head" thereof should give it? The construction thus contended for would prevent the fulfillment of the object contemplated by the act itself. If it be once held, that there can be other "heads of any principal department" than those existing in the ordinances at the time the act was passed, then new heads may from time to time be created by the common council, or the appointing officers; and every foreman who has a squad of men at work under him, will be considered the head of a department. The object of the law is to provide for appointment to office upon the basis of merit and fitness, as ascertained by competitive examinations which are open and free to all. But if the doctrine is to prevail, that new heads of any principal department may be created whenever the exigencies of politics or the demands of partisan service require it, appointments upon the basis of merit and fitness will soon cease to be made. In addition to this, the act contemplates that promotions shall be made from one grade of the Civil Service to another upon the basis of ascertained merit and seniority in service and examination. If, however, every officer, who has a number of subordinates under him, is to

BLEED THROUGH

be regarded as the head of a principal department, there can be no opportunity for promotion. If all are heads and all thus occupy the highest grades, there will be no lower grades from which subordinates can rise by promotion. Thus, the intention of the legislature in passing the act to make both original appointments and subsequent promotions, depend upon merit, and upon merit as ascertained by examinations, will be defeated. It is well settled, that courts will construe an act of the legislature, so as to give effect to the plain intention of the body, as embodied in the act. (Soby v. The People, 134 Ill., 66.) In so far as the administration of the Civil Service Act is dependent upon the action of the judicial department, "it is entitled to, and doubtless will, receive a fair and liberal construction, not only according to its letter, but its true spirit and the general purpose of its enactment." (People v. Roberts, 148 N. Y., 360.)

But section 11 also says that officers "whose appointment is subject to confirmation by the city council" shall not be included in the classified service. Counsel say, that the heads of the principal departments, as created in the ordinances already referred to, are officers whose appointment is subject to confirmation by the city council. It is, therefore, argued that if the words "heads of any principal department of the city" refer only to the single heads already referred to, then section 11 is subject to the criticism of a mere repetition in the matter of the excepted class. The theory of counsel seems to be this: when section 11 said that officers, whose appointment is subject to confirmation by the city council, shall not be included in the classified service, it said thereby that the head

POOR COPY

of each principal department, as named in the ordinances, should not be included; and that, this being so, when it afterwards used the expression "heads of any principal department of the city," it merely repeated an exception which had been already made, if the construction contended for by the attorney general is correct. It is true that each head of each principal department comes under both designations in section 11, to wit: the designation "whose appointment is subject to confirmation by the city council," and also the designation "heads of any principal department of the city." But the same is true of several other officials mentioned in section 11. Thus, the section mentions judges and clerks of election. Judges and clerks of election are included in the previous expression, to wit: "Officers * * * who are elected by the city council pursuant to the city charter." This is so because section 9 of article 4 of the City and Village Act provides, that the city council shall appoint the judges and clerks of election. It may be said, therefore, that the mention of judges and clerks of election in section 11 is a mere repetition of the designation of those officials, which had already been made under the designation of officers elected by the city council pursuant to the city charter. Section 11 mentions as persons not included in the classified service "members of any board of education." But "members of any board of education" are included in the previous designations of officers elected by the people, and of officers whose appointment is subject to confirmation by the city council. This is so, because section 2 of article 6 of the school law provides that, in school districts having a population of

BLEED THROUGH

not over 100,000 inhabitants, there shall be elected a board of education, while section 17 of that act provides that in cities having a population exceeding 100,000 inhabitants, the board of education shall be appointed by the mayor by and with the advice and consent of the common council. (Starr & Cur. Stat., 2 Ed,. pp. 3691, 3695.) So, also, in reference to members of the law department as mentioned in section 11, the corporation counsel who is the head of that department, is an official whose appointment is subject to confirmation by the city council.

Section 11 designates certain officers with reference to the mode of their appointment, to wit: election by the people or election by the city council, or appointment subject to confirmation by the city council. It then proceeds to designate certain officials, who may be selected by one or more of the three modes already specified. The fact, therefore, that the mention of "heads of any principal department of the city" is a repetition of a class previously designated has no particular significance, except in the light of the views hereafter expressed upon that subject.

It is a well settled rule of construction, that, where there are two provisions, one of which is general and designated to apply to cases generally, and the other is particular and relating to one subject, the particular provision must prevail, and must be treated as an exception to the general provision. (Dahnke v. The People, 168 Ill., 111.) Section 3 provides that the Commissioner shall classify all the offices and places of employment in the city with reference to the examinations, provided for, except the offices and places mentioned in

POOR COPY

section 11; and further provides that no appointment to any of such offices or places shall be made except under and according to the rules provided for in the act. When these words of section 3 are applied to section 11, section 11 means that all officers and employes of "any principal department of the city," except the "head" or "heads" thereof, shall be included in the classified service.

This is a broad and general direction, but there is an exception to it. Wherever there is any officer, whose appointment is subject to confirmation by the city council, provided the office filled by him had been created and was in existence when the act was passed, such officer is not to be included in the classified service, even though he be a subordinate in one of the principal departments of the city. The same is true, if such officer is one elected by the people, or elected by the city council. Thus, in the department of law the ordinance provides that that department shall embrace the corporation counsel, the city attorney, the prosecuting attorney, and such number of assistants and clerks as the city council may by ordinance see fit to prescribe and establish. The corporation counsel is made the head of the law department, but the city attorney is an officer who is elected by the people. He, therefore, is not included in the classified service. So, in the ordinance in regard to the department of health it is provided that the department shall embrace the commissioner of health, the superintendent of police and others. Although the commissioner of health is made the head of the department of health, yet, as the superintendent of police is an official whose appoint-

BLEED THROU

ment is made by the mayor subject to the confirmation by the city council, the superintendent of police is an officer who is not included in the classified service, Still, again, the ordinances create a department of finance, of which the city comptroller is made the head. It is provided that this department of finance shall embrace the city comptroller, the city treasurer. and others. But as the city treasurer is an officer who is required by the statute to be elected by the people, he is not included in the classified service. We are inclined to the opinion that, if any member of any principal department of the city is an official whose appointment is made by the mayor subject to confirmation by the city council, he is not to be included in the classified service. notwithstanding he may not be made the head of the department. Thus it would appear that the two clauses, "officers whose appointment is subject to confirmation by the city council," and heads "of any principal department of the city," should be construed together, in order to make them consistent with each other.

It seems to be contended by counsel for the respondent Kipley, that, inasmuch as officers whose appointment is subject to confirmation by the city council are excepted from the operation of the act, the common council may, by ordinance, increase the number of officers so to be appointed, and thereby increase the number of exceptions under section 11.

Accordingly, the plea filed by the responden: Kipley, sets up the ordinance of June 28, 1897, which is fully described in the statement of facts preceding this opinion.

POOR COPY

That ordinance requires that certain subordinate officers or employes in certain of the principal departments of the city government shall be "designated as heads of principal departments," as said term is used in section 11 of the Civil Service Act, "and shall be nominated by the mayor and shall be confirmed by the city council."

This ordinance was passed by the city council of Chicago after the present proceeding was commenced in this court, and after the petition and answers had been filed and demurred to. If it is a valid ordinance and has the effect which it was intended to have, it it will certainly nullify and make worthless the Civil Service Act.

Its passage is not defended or indorsed by the respondents, who are Civil Service Commissioners. We have held, that ordinances passed by the common council must be reasonable in order to be valid, and that they must spring from an honest exercise of legislative discretion. (Bloomington v. C. & A. R. R. Co. 134 Ill., 451; Hawes v. City of Chicago, *supra*.)

The Civil Service Law is binding as well upon the common council of the city, as upon the other persons mentioned in the act. (Peck v. Belknap, 130 N. Y., 394.) The ordinance assumes to define the meaning of the words "heads of any principal department of the city" as those words are used in the Civil Service Act. The power to interpret and construe a statute, or to define the meaning of the terms therein, rests with the courts, and not with the legislature, and certainly not with a subordinate legislative body like the common council of a city. (23 Am. & Eng. Enc. of

BLEED THROUG

Law, 449.) The ordinance does not create any new office or any new department, but simply provides that certain subordinate officials in departments already created shall be designated as heads of principal departments, and shall be appointed in a different manner from that in which existing ordinances require them to be appointed. Such an ordinance is invalid as being beyond the power of the common council to pass it, in view of the provisions of the Civil Service Act, and of the City and Village Act. As has already been stated, sections 3 and 11 of the Civil Service Act provide in effect, that all the subordinate officers and employes of any principal department of the city shall be embraced within the classified service. The ordinance of June 28th, provides in effect, that certain designated subordinates in the principal departments of the city government shall not be included in the classified service. The ordinance, is, therefore, directly in the teeth of the statute.

This will further appear from a consideration of the meaning of sections 2 and 3 of article 6 of the City and Village Act, as those sections bear upon, and have reference to, the ordinances hereinbefore mentioned, which existed at the time of the passage of the Civil Service Act.

Section 2 of said article 6 provides that "The city council may in its discretion from time to time, by ordinance, passed by a vote of two-thirds of all the aldermen elected, provide for the election by the legal voters of the city, or the appointment by the mayor with the approval of the city council, of a city collector, a city marshal, a city superintendent of streets, a corporation counsel, a city comptroller, or any or eithe

POOR COPY

of them, and such other officers as may by said council be deemed necessary or expedient. The city council may, by a like vote, by ordinance or resolution, to take effect at the end of the then fiscal year, discontinue any office so created, and devolve the duties thereof on any other city officer," etc. Section 3 provides, that all "officers of any city, except where herein otherwise provided, shall be appointed by the mayor (and vacancies in all offices except the mayor and aldermen shall be filled by like appointment) by and with the advice and consent of the city council. The city council may, by ordinance not inconsistent with the provisions of this act, prescribe the duties and define the powers of all such officers, together with the term of such office," etc. (1 Starr & Cur. Stat., 2 Ed., pp. 721, 722.) Said section 2 provides for the creation of certain offices by ordinance passed by a vote of two-thirds of the aldermen elected. Section 2 gives the council power to provide, in the manner therein stated, for such other offices than those specifically mentioned, as may by said council be deemed necessary or expedient. It thus provides for officers not specifically named in the section, and whose designation cannot be determined until the ordinance therein provided for is passed. In other words the second section gives the common council power to provide in a certain way for the election or appointment of officers whose designation and duties are not mentioned in the statute, but whose designation and duties are to be fixed by ordinances to be subsequently passed. The object of the section cannot be accomplished without action on the part of the city council.

Section 3 merely provides for the mode of appointing

BLEED THROUGH

individuals to the offices created by section 2. The officers referred to in section 3 are the officers to be created by ordinance, as provided in section 2. For example, the common council of the City of Chicago, under the authority contained in section 2, provided for the appointment by the mayor with the approval of the city council, of a superintendent of police. When the present mayor appointed the respondent Kipley, to the position of superintendent of police, he appointed him under the authority contained in section 3. Section 2 creates the office, section 3 provides for the appointment of an individual to the office so created. The ordinance mentioned in section 2 creating the office must be passed by a two-thirds vote of the aldermen elected, but the confirmation provided for by section 3 may be accomplished by a majority vote.

From what has been said, it is apparent, that the words "whose appointment is subject to confirmation by the city council" as used in section 11 of the Civil Service Act, refer to officers whose appointment was subject to such confirmation at the time the Civil Service Act went into force. The words used are "is subject," not "may be subject" by some future action of the council. Section 11 refers, by the use of the words last quoted, to officers whose positions had then already been created, by virtue of the power contained in section 2 of article 6 of the City and Village Act. It could not refer to officers whose positions might thereafter be created, because in that view, there were no officers whose appointment was subject to confirmation by the city council. The appointment of an officer, whose position has not yet been brought into being, cannot be subject now and at the present

POOR COPY

time to confirmation by the city council. The words in section 11 refer to cases where the council had already acted under said section 2 of article 6, In the case at bar the city council of Chicago had already passed ordinances providing for the appointment by the mayor subject to confirmation by the city council, of the heads of the fire, police, public works, buildings, health and law departments. The appointments of these officials had been provided for when the act went into force, and they are referred to by the terms of section 11. They were then existing officials, and were made exempt from the operation of the Civil Service Law. It is true that, under section 2 the common council might discontinue an office created under section 2, where such an office was unnecessary, in order to devolve its duties upon some other officer.

But the common council had no right to pass an ordinance, providing that subordinates in a department already created should be elevated to be the heads of such department. To hold that it had such right would be to hold that it could nullify the Civil Service Act by making every person holding a position, however subordinate, an official whose appointment should be subject to confirmation by the city council, thereby taking his appointment out from the operation of the Civil Service Act. To construe the act, so as to permit such a result as this would be to construe it in opposition to the intention of its authors and not with a view to carrying out such intention

The Civil Service Act provided that all laws or parts of laws, which are inconsistent with it or with any of its provisions, were thereby repealed. Hence, any pro-

BLEED THROUGH

visions, either of the City and Village Act, or of any ordinance of the city, which provided for a different mode of appointment than that specified in the Civil Service Act, was repealed, except so far as it might come within the exceptions named in section 11.

It is to be noted that the words "in all cases where "it is practicable," are only used in the act in reference to the subject of promotion. The New York Constitution and the Civil Service Acts passed by the legislature of that state provided that appointments and promotions in the Civil Service should be made according to merit and fitness, to be ascertained "so far as practicable," by examinations. (People v. Roberts, *supra;* Chittenden v. Wurster, *supra.*)

But in the Illinois Civil Service Act, this word "practicable" is not used in connection with the subject of examinations.

Our conclusion upon this branch of the case is, that the assistant superintendent of police, inspectors of police, and captains of police, are not excepted from the operation of the Civil Service Law, by the provision of section 11, or by any other provisions in the act. The same is true as to all positions in the other principal departments of the city government herein mentioned, which are of a lower grade than the chiefs or heads of those departments or which are subordinate to such chiefs or heads. This statement, however, is subject to this qualification, namely: that, wherever, at the time the Civil Service Act was passed, an office or place of appointment was one, the appointment to which was to be made by the mayor, subject to confirmation by the city council, it is within the exception

POOR COPY

named in section 11 and is excluded from the classified service.

Third. Certain objections are made to the petition as a pleading. It is contended that the demurrer to the answers should be carried back to the petition. We do not regard the petition as defective in any essential particular. The right of mandamus lies to compel the performance of a public duty, or in the enforcement of a public right, and, in such case, no demand and refusal need be shown. (Brokaw v. Commissioners, 130 Ill., 482; People v. Commissioners, 127 Ill., 613.) The respondents, who are made parties to the petition, are the only necessary parties. (Dement v. Rokker, 136 Ill., 174.)

The answers neither admit nor deny some of the averments in the petition. Wherever an averment of the petition well pleaded is not expressly denied, in the answer, it must be taken to be true. (C. & A. R. R. Co. v. Suffern, 129 Ill., 274.) A petition for mandamus must set forth a clear right on the part of the relator to have the act performed. It must also show that it is the plain duty of the party against whom the remedy is sought, to act in the premises. (People v. Mt. Morris, 145 Ill., 427; People v. Elgin, 66 Ill., 507.)

We are of the opinion that, in this case, a clear right is shown on the part of the relator and a clear duty on the part of the respondents. It was the duty under the act of the respondent Kipley, to notify the Commissioners of vacancies that existed in his department under section 10 of the act, and it was the duty of the Civil Service Commissioners to certify to him the names and addresses of the candidates to be appointed to fill the vacancies in the manner prescribed in the act.

BLEED THROUG

Accordingly it is ordered that the writ of mandamus issue to the respondents, the one to give the notice and the others to make the certification, as prayed in the petition.

Writ awarded.

PHILLIPS, C. J. dissenting:

I do not concur in all that is said in this opinion nor in the judgment announced.

The phrase "heads of any principal department" would include more than a single official who is an officer provided for by the city and village act.

Included in that phrase, would be an employe, who, in the absence of the chief officer, would, under his duties, have control of the department; as it also would include an employe having charge of a distinct branch of the service employing a large number of men.

Any head of a division having duties to discharge which causes him to be directly responsible to the mayor or city council for the manner in which he supervises and cares for the service intrusted to him, and who has confidential and personal relations to the chief officer in such service, or to the mayor and city council would, in my opinion, be included in the phrase "heads of any principal department," as used in Par. 11 of the act, and not subject to classification under Par. 3 of that act.

In my opinion the writ should not be awarded.

BOGGS, J., dissenting:

I concur in the view it was within the constitutional power of the General Assembly to enact the "Act to regulate the Civil Service of cities," but join Mr. Chief Justice Philips in dissenting to the conclusion that

POOR COPY

the law-making power intended that the phrase "heads of any principal department of the city," incorporated by the General Assembly in the 11th section, should be construed by the court to mean the "head" or chief officer only of such department.

The appointment of the "head" or chief officer of "each principal department of the city" is subject to confirmation by the city council, and the General Assembly having declared by a prior phrase in the same section that "officers whose appointment is subject to confirmation," should be exempted from the operation of the act, it is not reasonably to be presumed or supposed the latter phrase was inserted merely as a repetition of the former, but that it was employed for the purpose of exempting from the effect of the act other officers than those included in the former exempting clauses.

The construction given the phrase under consideration simply refuses to accord it any meaning or force whatever and in effect expunges it from the act, for it is clear the section, as construed by the court, would be given the same effect if the phrase in question did not appear at all.

The rejection of a portion of an act is only to be resorted to as a desperate and heroic remedy necessary to be employed for the preservation of the act itself.

It is a universal rule of construction so frequently declared that the citation of authorities is superfluous that the words of a statute of common use are to be taken in their natural, plain, obvious and ordinary signification, "and that a plain, common sense interpretation of such words are to be accepted rather

BLEED THROUGH

than a refined and technical grammatical construction." It must be conceded the meaning of the words "heads of a department" is not, in popular and common acceptation, at all a matter of doubt. It does not mean the "head" alone of the department, but the chief or principal governing officers thereof.

The meaning of the word in this instance is the word itself, and there is no occasion to invoke the refinements of construction to defeat it."

After the rendition of the above opinion, and on January 12, 1898, a petition for rehearing was filed on behalf of the respondent Kipley, superintendent of police, but none was filed on behalf of the respondents, Kraus, Winston or Washburne, Civil Service Commissioners.

A writ of error was allowed by Mr. Chief Justice Phillips, and an order approving the bond of said Kipley, made on January 17, 1898.

A citation issued, returnable on the 18th day of February, 1898.

A copy of said petition is hereto annexed as Exhibit "A."

On the 4th day of February, 1898, a rehearing was denied.

The salient facts are clearly stated in the opinion of the Supreme Court of Illinois, but we are, perhaps, justified in calling attention to a few matters shown by the record, and not specifically, or in detail, set forth in the opinion, and among them:

First. The prayer of the original petition for mandamus, which was as follows:

POOR COPY

"Petitioner therefore prays that leave may be granted "to file this petition, and that a summons or rule may "issue to the said Adolf Kraus, Dudley Winston, "Hempstead Washburne and Joseph Kipley, to an- "swer the same, to be made returnable to the present "term of this court, and that a writ of mandamus may "issue to the said Adolf Kraus, Dudley Winston and "Hempstead Washburne, Civil Service Commissioners "as aforesaid, and Joseph Kipley, superintendent of "police of the City of Chicago, as aforesaid, directing "and commanding the said Joseph Kipley to notify "said Civil Service Commissioners of all vacancies "existing in the positions of assistant superintendent "of police, inspectors of police and captains of police "in said City of Chicago, and commanding said Civil "Service Commissioners to submit to said Joseph "Kipley as such superintendent of police, the names "of not more than three applicants for promotion for "each vacancy from the grade next below that in "which such vacancy or vacancies exist and that "your petitioner may have such other or further relief "as the nature of the case may require."

Second. The separate answer of Kipley, as superintendent of police, in which he sets up among other things, as follows:

"Third That although an act entitled 'An Act to "regulate the Civil Service of Cities' was passed and "approved substantially as stated in said petition, "and although the same was afterwards submitted to "a vote of the electors of said city, and although the "electors of said city by a large majority of votes adopt- "ed the said act as set forth in said petition, yet these "respondents are informed by counsel learned in the

BLEED THROUGH

"law, as they here insist, *that the said act was and* "*is unconstitutional and void*, for the following reason: "*that the said act purports to confer judicial powers* "*and authority to make and enforce judgments and* "*decisions of a non-judicial body described and set* "*forth in said act as the 'Civil Service Commission,'* "*for which reason*, this respondent submits whether "he, in the capacity in which he is herein and here- "by impleaded, should act further, especially in the "performance of the matters and things which it is al- "leged in said petition he has not done and not per- "formed, and whether he should make any further "answer unto the said petition, and he claims the "same benefit and advantage as to matters and "things hereinbefore stated and set forth, as if he had "demurred to the said petition."

There was no other reference in the answer of Kipley to the unconstitutionality of the law.

To it a special demurrer was filed on the 16th day of June, 1897.

On the 10th of July, 1897, after, as will be noted, the filing of the answer by Kipley and the demurrer thereto by the People, and in vacation, he filed a plea *puis*, setting up the passage of the ordinance of June 28, 1897, known as the Power's ordinance, and its approval by the mayor on July 1, 1897.

A motion to withdraw this answer and plea and for leave to file an amended and supplemental answer was made on the 7th day of October, 1897, and denied on the following day. The motion is reported in Peo. v. Kipley, 167 Ill., 638, and the grounds of denial were that no showing had been made or reasons filed in support of the motion.

POOR COPY

To the pleas *puis* a demurrer was filed on the 18th day of October, 1897.

A separate answer by Kraus, Washburne and Winston, Civil Service Commissioners, had been filed on June 15, 1897, to which a demurrer had been interposed. They did not join in the petition for the writ of error. (See Exhibit "A.")

BRIEF.

I.

THE PETITION FOR A WRIT OF ERROR DID NOT RAISE A FEDERAL QUESTION.

A certificate of a chief justice of the highest tribunal of a state is of itself not sufficient to originate a question of that character.

Felix v. Scharnweber, 125 U. S., 54.

II.

NO FEDERAL QUESTION WAS INVOLVED.

The petition for the writ of mandamus did not seek to disturb Kipley, Kraus, Washburne, Winston, or any person who could be ascertained, in the incumbency of their offices. The defendant in error asked that directions issue to the chief of police and civil service commissioners in the performance of public duties prescribed by the civil service act. If the effect of such directions should be the cause of disappointment thereafter to any person holding or seeking a position under the municipal authorities, he

BLEED THROUG

would be at liberty to waive his supposed grievance, or, if he should deem it sufficient, at equal liberty to bring his suit.

"It is well settled that in order to give this court juris-"diction to review a jud'gment of a state court against a "title or right set up or claimed under a statute of or an "authority exercised under the United States, that title or "right must be one of the plaintiff in error and not of a "third person only."

Giles v. Wheaton, 134 U. S., 645.

III.

NO FEDERAL QUESTION WAS RAISED.

"The jurisdiction of the United States Supreme Court "to re-examine the final judgment of a state court cannot "arise from inference but only from averments so distinct "and positive as to place it beyond question that the party "bringing the case up intended to assert a Federal right."

Oxley Company v. Butler Co., 166 U. S., 648.

Levy v. Superior Court, 167 U. S., 175.

Kipley's claim that the Illinois Civil Service Act "was "and is unconstitutional and void for the following *rea-*"*son*, that the said act purports to confer judicial powers "and authority to make and enforce judgments and decis-"ions of a non-judicial body described and set forth in the "said act as a Civil Service Commission," did not draw in question any statute of the state upon the ground that it was repugnant to the Constitution of the United States, or constitute a claim of right, title, privilege or immunity under that constitution.

POOR COPY

We quote from the opinion of Mr. Chief Justice Fuller, in Miller v. Cornwall R. R. Co., Supreme Court Reporter, November 15, 1897, Vol. 18, p. 34: "We "have no jurisdiction on a writ of error to a state court "to declare a state law void on account of its collision "with a state constitution; and it was long ago held that "where it was objected in the state courts that an act of "the state was 'unconstitutional and void,' the objection "was properly construed in those courts, as raising the "question whether the state legislature had the power, "under the state constitution, to pass the act, and not as "having reference to any repugnance to the Constitution "of the United States. (Porter v. Foley, 24 How., "415.)"

It is true that the state court discusses the question of constitutionality, but as the opinions of the majority and minority judges all show, with reference only to the Constitution of Illinois.

The opinion is part of the record;

Eagan v. Hart, 165 U. S., 188,

and may be looked into to ascertain whether the decision of a Federal question was necessary to the decision of the case

Eagan v. Hart, *supra*.

Unless the decision of a Federal question by the State Court was essential to a decision of the case, even though one was passed upon, this court is without jurisdiction to review it.

Eustis v. Bolles, 150 U. S., 361.
Hammond v. Conn., &c., *ibid.*, 633.

BLEED THROUGH

The question really necessary to be decided as to Kipley, as the Civil Service Commissioners especially disclaimed disputing the constitutionality of the Civil Service Act, was the validity of the ordinance of June 28, 1897, because the plea *puis* by which it was set up operated as a waiver or withdrawal of the answer.

If it be said that an unconstitutional act would not be enforced or that a court should not lend its aid to enforce it by mandamus or other process the answer here is that the judgment of the state court is sufficient. Until the announcement of the opinion of that court plaintiff in error Kipley was content to abide its judgment.

After the decision in People v. Kipley, *supra*, he allowed the cause to be submitted without objection, his counsel participated in the argument, and he even caused to be filed a petition for rehearing, although he afterwards presented to the chief justice a petition for writ of error and the same was allowed.

Again, this court and the Supreme Court of Illinois are in accord upon the following proposition: "Statutes "constitutional in part only will be upheld as to what is "constitutional, if it can be separated from the unconsti "tutional provisions."

Syllabus, Presser v. Illinois, 116 U. S., 152, being the Illinois Militia Act case.

The case as made in the state court, as already stated, did not involve a forfeiture, and the answer of Kipley did not so claim. He simply asserted that the act was unconstitutional, because it attempted to delegate judicial powers to a non-judicial body.

The claim (considered for the moment as addressed to the United States Constitution) goes to the act as a whole,

POOR COPY

and, unless that act in all its parts is void, or the bad so intermingled with the good that they cannot be separated and must fall together, must fail.

To make an analysis of the act to regulate the civil service of cities, R. S. Ill., Ch. 24, Sec. 446, *et seq.*, would extend this brief improperly, but the court will see that the sections coming within the averments of the answer of unconstitutionality are not vital or essential to the act or so interwoven with the scheme of it as to be inseparable.

IV.

WAS THE ALLOWANCE OF THE WRIT OF ERROR PREMATURE.

The judgment of the state court was rendered December 22, 1897, and was final in its nature, but the respondents had the right to apply for a rehearing. Kipley gave notice of intention within fifteen days, or before January 6, 1898.

Rules, Ill. Supreme Court, 156 Ill., 648, which was allowed. He filed a petition for rehearing, and thereby clothed the state court with power to modify or annul its judgment. He filed his petition for writ of error, it was allowed and bond was filed. That court acted on the petition for rehearing on February 4, 1898.

The question is, was not the final order or judgment under the rules of this court, as applied to this case, the judgment of February 4, 1898, and not that of December 22, 1897? Kipley may well be taken to have waived his writ of error by not withdrawing his petition for rehearing, or the action of the court as such on February 4,

BLEED THROUGH

1898, in denying a rehearing may be considered a vacation of the allowance of the writ of error by the chief justice on the 17th day of January, 1898.

Respectfully submitted.

EDWARD C. AKIN,
Attorney General of Illinois.
GEORGE W. SMITH,
FRANK P. BLAIR,
MURRY NELSON, JR.,
Counsel for Defendant in Error.

POOR COPY

EXHIBIT "A."

To the Honorable Jesse J. Phillips, Chief Justice:

Your petitioner, Joseph Kipley, by Charles S. Thornton, his attorney, respectfully represents that he is the respondent above named and that feeling aggrieved by the final order or judgment rendered and entered against him by the Supreme Court of Illinois, in the above entitled cause, on December 22, 1897, now comes and with him brings the complete transcript of the record therein in said court and respectfully alleges that it appears therein that there is manifest error on the part of the Supreme Court of Illinois in this:

First. That said court erred in refusing to grant to your petitioner leave to amend his answer herein and to withdraw his plea *puis darrein continuance*, so as to more fully present the matters and things as therein stated and especially the constitutional questions wherein and whereby rights, titles, privileges and immunities as against the petition of the relator herein and under and by virtue of the Constitution of the United States were respectively specified, set forth and claimed.

Second. That said court erred in not receiving the amended answer of your petitioner and in not considering the same at the hearing.

Third. The court erred in refusing to quash the rule to show cause issued herein, for want of jurisdiction.

Fourth. The court erred in granting the prayer of relator's petition and in making the order or rendering the judgment of date December 22, 1897, awarding a

BLEED THROUGH

peremptory writ of mandamus as against your petitioner, and among other, for the following reasons:

1. Because the Civil Service Act, being an act of the General Assembly of the State of Illinois, entitled "An Act to regulate the Civil Service of Cities" (Approved March 20, 1895. In force July 1, 1895), abridges and privileges and immunities of citizens of the United States, in that it renders all such citizens who do not apply for office or for place of employment ineligible to appointment or for selection therefor, whereas it is the right and privilege of every citizen to hold office and serve the public.

2. The said act of March 20, 1895, deprived a duly elected and qualified officer of the right to select his subordinates and provide the requisite agencies for performing his official duties, thus abridging the rights, privileges and immunities belonging and guaranteed by its constitution to every citizen thereof.

3. The said act of March 20, 1895, provides for the invasion of the rights of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.

4. The said act of March 20, 1895, purports to prescribe for the criminal trial of public officers for nonfeasance, for misfeasance, for malfeasance in office, and for the infliction of the penalties therefor, of deprivation of office, of fine, of imprisonment, and incapacity to hold office thereafter, by a non-judicial body, and in such manner that the accused shall not enjoy the right to a speedy and public trial by an impartial jury, of the state or district wherein the crime shall have been committed; and without informing the

POOR COPY

accused of nature and cause of the accusation, and without confronting the accused with the witnesses against him; and without permitting the accused to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

5. That said act denies to the citizen the freedom of political action making it plainly penal for the citizen to take part in party politics.

6. That said act of March 20, 1895, provides for the creation and maintenance of an office holding class, at the expense of the people who are excluded therefrom by the operation of the said act.

7. And generally said act of March 20, 1895 is directly in contravention of the right of that clause of the United States Constitution, which prescribes that:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the laws,"

so that the said record presents all said several questions each of which is peculiarly within and for the jurisdiction of the Supreme Court of the United States, pursuant to the statutes of the United States in such case made and provided especially where as here shown in and by said record, titles, rights, privileges and immunities are specifically set forth and claimed,

BLEED THROUGH

and where the decision of the highest court of a state to which the case can be taken is in denial of such titles, rights, privileges and immunities.

Wherefore, your petitioner would respectfully ask your Honor to grant unto him and under and pursuant to the acts of Congress to this and allow a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Illinois, that the said record may be reviewed and the said error therein may be corrected and speedy justice done in the premises, and that said writ of error may be made a supersedeas; and as in duty bound your petitioner will ever pray.

JOSEPH KIPLEY,
Respondent.
By CHAS. S. THORNTON,
His Attorney.

POOR COPY

No. 586 and 601.

Motion Papers for P. E.

FILED,
MAR 14 1898
JAMES H. McKENNEY,
CLE

Filed Mar. 14, 1898.

Supreme Court of the United States

OF THE OCTOBER TERM, A. D. 1897.

No. 586.

JOSEPH KIPLEY.
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. EDWARD C. AKIN, Attorney General,
Defendant in Error.

OF THE OCTOBER TERM, A. D. 1897.

No 601.

JOSEPH KIPLEY,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. EDWARD C. AKIN, Attorney General,
Defendant in Error.

MOTIONS WITH SUGGESTIONS.

CHARLES S. THORNTON,
Attorney for Plaintiff in Error.

Geo. Hornstein & Co., Printers, Chicago.

IN THE

Supreme Court of the United States.

OF THE OCTOBER TERM, A. D. 1897.

No. 586.

JOSEPH KIPLEY,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. EDWARD C. AKIN, Attorney General,
Defendant in Error.

OF THE OCTOBER TERM, A. D. 1897.

No 601.

JOSEPH KIPLEY,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. EDWARD C. AKIN, Attorney General,
Defendant in Error.

MOTIONS WITH SUGGESTIONS.

I.

We make the preliminary objection to the consideration, before the hearing, of the motion to dismiss that it is premature. The record has not yet been printed, and

a reference to a voluminous transcript of record would be necessary thereto.

National Bank v. *Insurance Co.*, 10 Otto. 43.

II.

We have taken out two writs of error upon the same record. The first writ of error was taken out on January 19, 1898, and the cause was subsequently docketed in this court as No. 586 of the October Term, A. D. 1897. Thereupon the defendant in error by his counsel moved to dismiss for the reason that no Federal question was raised or involved in the record. The learned counsel in their brief insist that for the reason that a motion for a rehearing was pending when we sued out the writ of error that its allowance was premature. But since then and on February 4, 1898, the Supreme Court of Illinois denied the petition for rehearing; therefore we first come here now and ask on the part of the plaintiff in error for leave to file instanter a supplement to the transcript of record already filed in said cause No. 586, showing the proceedings had in said cause in that court, so as to show that the said petition for rehearing has been denied and that the judgment specified in said writ of error is now in full force and effect.

To avoid any question as to the premature action suggested, on our part, on February 21st, we sued out another writ of error and a transcript of record to that date has been filed and the cause docketed as No. 601 of the October Term, A. D. 1897.

We respectfully ask that the two causes No. 586 and No. 601 may be united and consolidated. In doing this we waive the necessity of notice of a motion to dismiss

BLEED THROUG

as to No. 601 and consent, if opposing counsel so desire, that the motion to dismiss with the brief thereupon may apply to the record complete as it is now shown in No 601.

We submit these motions as counter to the motion to dismiss on the ground that the first writ of error was premature.

We respectfully insist that the first writ of error was not prematurely taken. For upon the entry of the order with the judgment for costs of date December 22, 1897, respondent Kipley's right to the writ from this court became complete under the Act of Congress. The petition for a rehearing was tentative, the motion to dismiss for want of jurisdiction was a repetition of a former motion. Both were optional with us.

By taking the writ of error and obtaining a supersedeas we doubtless, so far as the State Court was concerned, elected to waive all further proceedings in that court and rely upon the action of this court in review of the record ending with the judgment which was final. But as the State Court has since acted and denied the motion to dismiss as well as the petition for a rehearing, a second writ of error became necessary to bring up the subsequent rulings. By supplementing the record in 586 the two transcripts will become identical and the consolidation of the two cases will preserve all rights as to supersedeas, costs, etc. There is practically but one case to be considered on the merits.

Respectfully submitted.

CHAS. S. THORNTON,
Attorney for Plaintiff in Error.

POOR COPY

IN THE SUPEREME COURT OF THE UNITED STATES.
NO. 586 OF THE OCTOBER TERM, A. D. 1897.

Joseph Kipley,
Plaintiff in Error,
vs.
The People of the State of Illinois *ex rel.*, Edward C. Akin, Attorney General,
Defendant in Error.

And now comes the plaintiff in error, by his said attorney, and moves the court for leave to file a supplemental transcript of the record of the proceedings had in the Supreme Court of Illinois in the cause wherein judgment was rendered, and to correct which the writ of error herein has been prosecuted so as to show that since the suing out of said writ of error, and on the 4th day of February, A. D. 1898, the court overruled the motion to dismiss and denied the petition for rehearing made therein, and for such other or further order in the premises as may be just and proper.

CHAS. S. THORNTON,
Attorney for Plaintiff in Error.

BLEED THROUG

UNITED STATES OF AMERICA.

IN THE SUPREME COURT OF THE STATE OF ILLINOIS.

JUNE TERM, A. D. 1897.

STATE OF ILLINOIS, } ss.
SUPREME COURT. }

Proceedings had before the Honorable the Supreme Court of the State of Illinois, begun and held at Springfield, to wit, on the first Tuesday in the month, being the first day of February, A. D. 1898.

Present: JESSE J. PHILLIPS, Chief Justice; ALFRED M. CRAIG, Justice; JACOB W. WILKINS, Justice; BENJAMIN D. MAGRUDER, Justice; DAVID J. BAKER, Justice; JOSEPH N. CARTER, Justice; JAMES H. CARTWRIGHT, Justice; E. A. BAXTER, Sheriff; A. D. CADWALLADER, Clerk.

Be it remembered that in that certain cause entitled as follows:

The People of the State of Illinois, on the relation of Edward C. Akin, Attorney General,
vs.
Joseph Kipley, Superintendent of Police in the City of Chicago, and Adolph Kraus, Hempstead Washburne and Dudley Winston, Civil Service Commissioners.
— *Mandamus.*

The proceedings wherein were heretofore, to wit, on the first day of June, A. D. 1897, commenced and first had, when on said day came, the petitioners herein by the Attorney General, and moved the court for leave to file a petition for mandamus herein: Further proceedings were had herein as follows, to wit:

POOR COPY

An order was made by the court in the words and figures following, to wit:

And now on this day come the parties herein by their respective attorneys, and the court, not being sufficiently advised of and concerning the premises, the exceptions and motion of the respondent Kipley, as well as his petition for a rehearing in said cause, are each and all taken under advisement.

And be it further remembered that afterwards, to wit, on the 4th day of February, A. D. 1898, the court being then sufficiently advised of and concerning the premises, denied said motion, as well as the petition for rehearing, and thereupon an order was entered, which is in the words and figures following, to wit:

And now, on this day, come again the parties herein by their attorneys, and the respondents now present to the court a petition herein, praying the court to set aside and vacate the judgment herein, awarding a peremptory writ of mandamus against said respondents, rendered by the court at a former term; as also the judgment for cost against the said respondents, and for a judgment denying a peremptory writ of mandamus upon a rehearing as prayed in said petition, and the court, upon due consideration of said motions and petition, and being now sufficiently advised of and concerning the premises, it is ordered by the court that the motion to set aside the judgment awarding a peremptory writ of mandamus, as well the said judgment for costs and for a judgment denying a peremptory writ of mandamus, are hereby, each and all, denied, and the petition for rehearing is denied.

And be it further remembered that afterwards, to wit,

BLEED THROUGH

on the 25th day of February, A. D. 1898, there was filed in the office of the Clerk of said Supreme Court an appeal bond which is in the words and figures following, to wit:

"Know all men by these presents, that we, Joseph Kipley, as principal, and William Behrer, surety, both of the City of Chicago, in the County of Cook and State of Illinois, are firmly held and bound unto The People of the State of Illinois in the sum of five hundred dollars ($500), for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors and administrators jointly, severally and firmly by these presents.

Witness our hands and seals hereto this 23d day of February, 1898.

The condition of this obligation is such, that whereas the said Joseph Kipley, as Superintendent of Police of the City of Chicago, was, by the order and judgment of the Supreme Court of Illinois, made subject to a peremptory writ of mandamus, which order and judgment was entered in said court on the 22d day of December, 1897, in that certain cause then therein depending, wherein The People of the State of Illinois, on the relation of Edward C. Akin, Attorney General, were the plaintiff, and the said Kipley, as such Superintendent of Police, impleaded with others, was respondent; and, whereas, on the 4th day of February, 1898, the Supreme Court of Illinois by its further entered on that day denied the petition of said Joseph Kipley for a rehearing in said cause; and, whereas, further, the above bounden Joseph Kipley has sued out a writ of error from the Supreme Court of the United States to reverse the said order or judgment of the Supreme Court of Illinois:

Now, therefore, if the above bounden Joseph Kipley shall prosecute the said writ of error to effect and answer all damages and costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

JOSEPH KIPLEY. [SEAL]
WILLIAM BEHRER. [SEAL]

POOR COPY

STATE OF ILLINOIS, }
COOK COUNTY. } ss.

Personally appeared before me this 23d day of February, 1898, the undersigned, a Notary Public in and for said county and state, the above named Joseph Kipley and William Behrer, to me personally known to be same persons who executed the above and foregoing bond and severally acknowledged the same to be his free act and deed for the uses and purposes therein mentioned.

RICHARD P. HUDD,
[SEAL] *Notary Public.*

STATE OF ILLINOIS, }
COOK COUNTY. } ss.

William Behrer, being first duly sworn, doth on oath depose and say that he is a citizen of the United States and of the State of Illinois, resident of the City of Chicago, and that he is worth one thousand dollars ($1,000) over and above all his debts and liabilities, in property not by law exempt from execution.

And further deponeth saith not.

WILLIAM BEHRER.

Subscribed and sworn to before me this 23d day of February, 1898.

RICHARD P. HUDD,
[SEAL] *Notary Public.*

The above and foregoing bond is approved this 23d day of February, 1898.

JESSE J. PHILLIPS,
Chief Justice of the Supreme Court of Illinois."

And be it further remembered that afterwards, to wit, on the 25th day of February, A. D. 1898, together with a copy of the writ of error dated February 21, 1898, there were a citation and acknowledgment of service filed in the office of the Clerk of said Supreme Court, a copy of which citation and a copy of said copy of the writ of error are hereto attached and are respectively as follows, to wit:

BLEED THROUGH

"THE UNITED STATES OF AMERICA.

To Edward C. Akin, Attorney General of the State of Illinois:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington thirty days after the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Illinois, wherein Joseph Kipley, Superintendent of Police of the City of Chicago, impleaded with Adolph Kraus, Hempstead Washburne and Dudley Winston, Civil Service Commissioners, is plaintiff in error, and The People of the State of Illinois, on the relation of Edward C. Akin, Attorney General, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not done to the parties in this behalf.

Witness the Honorable Jesse J. Phillips, Chief Justice of the Supreme Court of the State of Illinois.

Done at Springfield, Illinois, this 21st day of February, A. D. 1898.

JESSE J. PHILLIPS,
Chief Justice of the Supreme Court of the State of Illinois.

I hereby acknowledge service of above writ this 25th day of Feby, A. D. 1898.

E. C. AKIN,
Attv. Genl.

UNITED STATES OF AMERICA, }
SOUTHERN DISTRICT OF ILLINOIS. } ss

The President of the United States of America to the Judges of the Supreme Court of Illinois, GREETING:

Because in the record and proceedings, as also in the rendition of the order or judgment in a plea that is before you in said Supreme Court between The People of the State of Illinois, on the relation of Edward C. Akin, Attorney General, the defendant in error, and Joseph Kipley, as Superintendent of Police of the City of Chicago, impleaded with Adolph Kraus, Dudley Winston

POOR COPY

and Hempstead Washburne, Civil Service Commissioners, plaintiff in error, wherein it is claimed certain right, title, privilege or immunity under the Constitution of the United States, and that the decision of your said court is against said right, title, privilege or immunity to the great damage of said Joseph Kipley, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf.

You are hereby commanded, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from and after this date, in the Supreme Court to be then and holden, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States at Springfield, Illinois, this 21st day of February, A. D. 1898, and of the Independance of the United States of America the one hundred and twenty-second.

[SEAL.] JAMES T. JONES,
Clerk of the United States Circuit Court in and for the Southern District of Illinois."

STATE OF ILLINOIS, }
SANGAMON COUNTY. } ss.

This is to certify that the above and foregoing is a true and correct copy of all the proceedings had since the 19th day January, A. D. 1898, and of record in the Supreme Court of the State of Illinois in that certain cause in which the People of the State of Illinois, on the relation of Edwin C. Akin, Attorney General, were the petitioners, and Joseph Kipley, Superintendent of Police of the City of Chicago, and Adolph Kraus, Hempstead

Washburne and Dudley Winston, Civil Service Commissioners were respondents, as the same appear from the records and files of my office.

In testimony whereof I hereunto set my hand and affix the seal of the said court at Springfield, Illinois, this 4th day of March A. D. 1898.

[SEAL] A. D. CADWALLADER,
Clerk Supreme Court.

IN THE SUPREME COURT OF THE UNITED STATES.

NO. 586 OF THE OCTOBER TERM, A. D. 1897.

Joseph Kipley,
Plaintiff in Error.
vs.
The People of the State of Illinois *ex rel.* Edward C. Akin, Attorney General,
Defendant in Error.

NO. 601 OF THE OCTOBER TERM, A. D. 1897.

Joseph Kipley,
Plaintiff in Error.
vs.
The People of the State of Illinois *ex rel.* Edward C. Akin, Attorney General,
Defendant in Error.

And now comes the plaintiff in error above named, and moves the court that the above entitled causes now pending, be consolidated or united for the reason that the same are writs of error based upon substantially the same record and raising the identical questions, or for such other or further order in the premises as may be just and proper.

CHAS. S. THORNTON,
Attorney for Plaintiff in Error.

Nos. 586 and 601.

FILED
MAR 14 1898
JAMES H. McKENNEY,
CLERK.

Brief of Thornton for P. E. (on mo

Filed Mar. 14, 1898.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1897.

NOS. 586 & 601.

JOSEPH KIPLEY,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS on the relation of EDWARD C. AKIN, Attorney General,
Defendant in Error.
} Error to Supreme Court of Illinois.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS WRIT OF ERROR WITH COUNTER MOTIONS.

CHARLES S. THORNTON,
Attorney for Plaintiff in Error.

Geo. Hornstein & Co., Printers, Chicago.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

No. 586.

JOSEPH KIPLEY,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. AKIN, Attorney General,
Defendant in Error.

In Error to the Supreme Court of Illinois.

Brief for Plaintiff in Error, in Resistance of Motion to Dismiss with Counter-motion for leave to file Supplemental Record and to unite the two writs of error sued out on said record by consolidating causes Number 586 and Number 601 of the October Term, A. D. 1897, of this court.

In the record in this cause the plaintiff in error in his answer averred that the said Civil Service Act was and is unconstitutional and void for the following reason, that the said act purports to confer judicial powers and authority to make and enforce judgments and decisions of a non-judicial body as described and set forth therein.

(See Rec., 51.)

This answer was filed on the return day of the rule to answer which was June 14, 1897. Afterwards and on the 7th day of October, 1897, the plaintiff in error, having in the meantime filed a plea in bar, setting up an ordinance which had been passed on June 28, 1897, asked leave to withdraw the plea and to amend his answer so as to set up the constitutional questions in his answer in the precise language in which they are stated and set forth in the following assignment of errors and to plead the said ordinance by way of supplemental answer. And afterwards and on the 12th day of October the Supreme Court of Illinois denied the said motions and each and all of them. This decision was a denial of the rights, privileges and immunities claimed under the Constitution of the United States.

(See Rec., 80–86, inclusive.)

Again, afterwards and on the 18th day of October, 1897, the plaintiff in error moved to discharge the rule to answer and to quash the same, and also to dismiss the petition and all proceedings had thereunder because the said court was without jurisdiction to grant the prayer of said petition, setting forth in said motion the identical constitutional questions which were raised in the proffered amendment to his answer as aforesaid.

And afterwards and on the 19th day of October, 1897, the court denied the said motion to quash the rule and dismiss the proceedings; this decision was also a denial of the rights, privileges and immunities claimed under the Constitution of the United States.

Afterwards on the 22d day of December, 1897, the said court entered an order awarding as against the plaintiff in error the peremptory writ of mandamus asked

BLEED THROUGH

for by the relator; this was a decision also in denial of the rights, privileges and immunities claimed under the Constitution of the United States.

And thereupon the court entered its judgment that the said respondents (among whom was the plaintiff in error), pay the costs of these proceedings.

See Rec., 140, 141.

The case is reported 171 Ill., pp. 44-93.

In the opinion it is said:

"*We deem it proper to dispose of the constitutionality of this act in view of the fact that the counsel for the respondent Kipley, furnishes us with an elaborate argument against its constitutionality, and the petitioner and the respondents, who are Civil Service Commissioners, present equally elaborate arguments in favor of its constitutionality.*" 171 Ill., pp. 57, 58. See Rec., 99; see also pp. 13, 14, Brief for Deft. in Error.

In view of all this we are somewhat surprised at the motion of the learned counsel for the defendant in error to dismiss. Opposing counsel also insists in his brief upon this motion that because at the time the writ of error was sued out on the 19th day of January, 1898, and petition for a rehearing was pending and undecided in said court, the said writ was prematurely taken. We bring with us here a supplemental transcript of the record, showing that afterwards and on the 4th day of February, 1898, the said court denied the said petition for a rehearing. This we claim is conclusive, leaving as it does the judgment of December 22d, to which the said writ of error was aimed, in full force and effect. We ask leave to file this supplemental record here as counter to the motion to dismiss. In order to save all question as to whether the said writ of error was premature or not, plaintiff in error has sued out another writ of error

POOR COPY

as shown by this supplemental transcript and brings with it an assignment of errors in which the subsequent decisions of the said court in denial of said rights of the plaintiff in error are set forth. And we further ask the court to receive the said supplemental record with the said assignment of errors and to consider the cases made by the two transcripts of the same record as one. We have caused the said second writ of error with the entire record to be docketed as Number 601, of the October Term, A. D. 1897. We respectfully ask the court that these two cases may be consolidated and heard and disposed of together as one.

Although the counsel for the defendant in error does not move to dismiss *or to affirm*, yet for the reason that he claims and insists that no constitutional question is shown by the record, we now proceed to the statement of the case and to discuss the constitutional questions specified in the following assignment of error:

ASSIGNMENT OF ERRORS.

And now comes Joseph Kipley, the plaintiff in error above named, by Charles S. Thornton, his attorney, and shows unto the court that in the record of the Supreme Court of the State of Illinois, in that certain cause wherein the People of the State of Illinois, on the relation of Edward C. Akin, attorney general, ask for a writ of mandamus against Joseph Kipley, Superintendent of Police of the City of Chicago, and Adolph Kraus, Hempstead Washburne and Dudley Winston, Civil Service Commissioners, which writ was awarded by order of said Supreme Court of Illinois, of date December 22, 1897; from which order the said Kipley, plaintiff in error, has sued out of the Supreme Court of the United States a writ of error.

BLEED THROUGH

There is manifest error in this:

First. The Supreme Court of Illinois erred in granting leave to the relator to file his petition therein and in ruling the respondents to answer the same.

Because that certain act of the General Assembly of the State of Illinois entitled " An Act to regulate the Civil Service of Cities, " approved and in force March 20, 1895, which it is sought by said petition to enforce, is null and void, the same being in violation of certain provisions of the Constitution of the State of Illinois and also of certain other provisions of the Constitution of the United States of America, that is to say, for the following reasons:

1. It abridges the privileges and immunities of citizens of the United States, in that it renders all citizens who do not apply for office or for place of employment ineligible to appointment or for selection therefor, whereas it is the right and privilege of every citizen to hold office and serve the public.

2. The said act of March 20, 1895, deprives a duly elected and qualified officer of the right to select his subordinates and provide the requisite agencies for performing his official duties, thus abridging the rights, privileges and immunities belonging and guaranteed by the said constitutions respectively to every citizen thereof.

3. The said act of March 20, 1895, provides for the invasion of the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.

4. The said act of March 20, 1895, purports to prescribe substantially for the criminal trial of public officers for nonfeasance, for misfeasance, for malfeasance in

POOR COPY

office, and for the infliction of the penalties therefor, of deprivation of office, and incapacity to hold office thereafter, by a non-judicial body, and in such a manner that the accused shall not enjoy the right to a speedy and public trial by an impartial jury, of the state or district wherein the crime shall have been committed; and without informing the accused of nature and cause of accusation; and without confronting the accused with the witnesses against him; and without permitting the accused to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for the defense.

5. That said act denies to the citizen the freedom of political action, making it highly penal for the citizen to take part in party politics.

6. That said act of March 20, 1895, provides for the creation and maintenance of an office-holding class, at the expense of the people who are excluded therefrom, by the operation of the said act.

7. And generally said act of March 20, 1895, is directly in contravention of the right of that clause of the United States Constitution, which prescribes that:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the laws."

8. And lastly, plaintiff in error avers that the said act of March 20, 1895, generally denominated the "Civil Service Act," is absolutely null and void, because the same purports to require the civil officers of the City of

BLEED THROUGH

Chicago to undergo tests as qualification for office and public employment in addition to the requirement of Section 25 of Article 5 of said Constitution of the State of Illinois, not only in contravention thereof, but of the general principles of popular government, and because it provides for a political test for the said commissioners respectively therein named, and because, further, the same is in contravention of Section 22 of Article 4 of said constitution, as well as many other provisions of said state constitution, and of the Constitution of the United States.

Second. The Supreme Court of Illinois erred in refusing said Kipley leave to withdraw his plea *puis darrein continuance*, and for the same reasons as aforesaid.

Third. The Supreme Court of Illinois erred in refusing the said Kipley leave to amend his answer, and for the same reasons as aforesaid.

Fourth. The Supreme Court of Illinois erred in refusing said Kipley leave to file a supplemental answer, and for the same reasons as aforesaid.

Fifth. The Supreme Court of Illinois erred in denying the respondent's motion to quash the rule to answer and to discharge the respondents therefrom and to dismiss the proceedings, and for the same reasons as aforesaid.

Sixth. The Supreme Court of Illinois erred in granting the order of judgment of December 22, 1897, awarding the writ of mandamus as to the said record set forth, and for the same reasons as aforesaid.

Seventh. The Supreme Court of Illinois erred in denying the motion to vacate the said judgment of December 22, 1897, and to dismiss allthe proceedings in said

POOR COPY

cause, and for the same reasons as aforesaid.

Eighth. The Supreme Court of Illinois erred in denying the petition of the said Kipley for a rehearing in said cause on February 4, 1897.

Wherefore the said plaintiff in error doth ask this Honorable court, the premises being seen, that the said errors be corrected, and that the order or judgment of the Supreme Court of Illinois of December 22, 1897, of which he complains, be reversed, and that such other proceedings be had herein as to this Honorable court may seem meet and to justice may appertain.

CHAS. S. THORNTON,
Attorney for Plaintiff in Error.

And in so doing we would now present our brief prepared for the hearing on the merits, viz:

BLEED THROUGH

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

JOSEPH KIPLEY,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. AKIN, Attorney General,
Defendant in Error.

In Error to the Supreme Court of Illinois

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The relator on June 5, 1897, with leave of court first had and obtained, filed his petition in the state Supreme court setting forth at length certain rules which had been adopted by the Commissioners under the civil-service act of Illinois on March 20, 1895 (which is hereinafter set forth), showing that the plaintiff in error was then the Superintendent of Police of the City of Chicago, and as such had neglected or refused to comply with said act and rules by not notifying the Commission of vacancies in the subordinate offices of the police department, known

POOR COPY

as assistant superintendent, the four inspectors, and the fifteen captains of police, and had not made requisition upon the Commission for certification of eligibles, so as to place these officers under the classified civil service as prescribed by the said act, and by filling such offices respectively by his own appointees. The relator sought a peremptory writ of mandamus against the plaintiff in error by which to enforce the law and the rules aforesaid. The court ruled the respondent to answer. (See Rec., 8–39.)

The plaintiff in error admitted in his answer that he had not given the notices, but had made the appointments regardless of the Commission, claiming, however, that under the ruling of the Commission and of the law department of the city and that according to the plain meaning of the statute the said officers respectively were not included in the classfied civil service of the city. (See Rec., 50–70.)

The plaintiff in error also set up in his answer the unconstitutionality of the act. (*Id.*, 51.)

The relator demurred to this answer (*Id.*, 71, 72) and the cause under the issue thereby joined was continued to the October term, whereupon the court was then adjourned in course for the June term. (*Id.*, 75.) On June 28, 1897, the city council passed an ordinance making all said officers principal heads of the police department so as to exempt them beyond all cavil from the jurisdiction of the Civil Service Commission. Plaintiff in error pleaded this ordinance in bar (*Id.*, 75–79), but immediately on the opening of the court at the next term asked leave to withdraw the plea and so amend his answer as to set up among other things specifically wherein the said act is in contravention of the Constitution of the United States, and the Constitution of the state of Illinois (*Id.*, 80–83) and for leave to plead this ordinance *de bene esse*, by way of a supplemental answer (*Id.*, 84,

BLEED THROUGH

85); but the court denied all these motions (*Id.*, 86), setting the case for argument on the petition, the answer and the demurrer thereto.

Thereupon the plaintiff in error moved to quash the rule and dismiss the proceedings on the ground that as the act in question is in contravention of specified clauses and provisions of the state constitution respectively, as well as of certain specified clauses and provisions of the Constitution of the United States, respectively, the court was without jurisdiction in this case (*Id.*, 87–89); after denying this motion the court proceeded with the hearing (*Id.*, 89, 90), and on December 22, 1897, entered an order awarding the peremptory writ. (*Id.*, 140, 141.)

To this order or judgment the plaintiff in error has brought this writ of error. It is here sought to reverse this order or judgment on the ground that in thus enforcing the said civil service act the Supreme court of Illinois has transcended its jurisdiction, for the reason that the said act of March 20, 1895, being as is alleged and specified in contravention of the constitution of the United States, is null and void. Thus this act of the General Assembly of the state of Illinois is now brought before this court.

The act is as follows:

CIVIL SERVICE ACT.

AN ACT TO REGULATE THE CIVIL SERVICE OF CITIES.

APPROVED MARCH 20, 1895.

SECTION 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: *Commissioners appointed—Oath.* The mayor of each city in this state which shall adopt this act as hereinafter provided, shall, not less than forty nor more than ninety days after the taking effect of this act in such city, appoint three persons, who shall constitute and be known

POOR COPY

as the Civil Service Commissioners of such city, one for three years, one for two years and one for one year from the time of appointment and until their respective successors are appointed and qualified; and in every year thereafter the mayor shall, in like manner, appoint one person as the successor of the commissioner whose term shall expire in that year to serve as such commissioner for three years and until his successor is appointed and qualified. Two commissioners shall constitute a quorum. All appointments to said commission, both original and to fill vacancies, shall be so made that not more than two members shall, at the time of appointment, be members of the same political party. Said commissioners shall hold no other lucrative office or employment under the United States, the State of Illinois, or any municipal corporation or political division thereof. Each commissioner, before entering upon the duties of his office, shall take the oath prescribed by the constitution of this state.

SEC. 2. *Removal of commissioners—Vacancy.* The mayor may, in his discretion, remove any commissioner for incompetence, neglect of duty or malfeasance in office. The mayor shall within ten days report in writing any such removal to the city council, with his reasons therefor. Any vacancy in the office of commissioner shall be filled by appointment by the mayor.

SEC. 3. *Classification.* Said commissioners shall classify all the offices and places of employment in such city, with reference to the examinations hereinafter provided for, except those offices and places mentioned in section 11 of this act. The offices and places so classified by the Commission shall constitute the classified civil service of such city; and no appointments to any of such offices or places shall be made except under and according to the rules hereinafter mentioned.

SEC. 4. *Rules.* Said Commission shall make rules to carry out the purposes of this act, and for examinations, appointments and removals in accordance with its provisions, and the Commission may, from time to time, make changes in the original rules.

SEC. 5. *Publication of rules. Time of taking effect.* All rules made as hereinbefore provided, and all

BLEED THROUGH

changes therein, shall forthwith be printed for distribution by said Commission; and the Commission shall give notice of the place or places where said rules may be obtained by publication in one or more daily newspapers, published in such city, and in each such publication shall be specified the date, not less than ten days subsequent to the date of such publication, when said rules shall go into operation.

SEC. 6. *Examinations.* All applicants for offices or places in said classified service, except those mentioned in section 11, shall be subjected to examination, which shall be public, competitive and free to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character. Such examinations shall be practical in their character, and shall relate to those matters which will fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed, and shall include tests of physical qualifications and health, and when appropriate, of manual skill. No questions in any examination shall relate to political or religious opinions or affiliations. The Commission shall control all examinations, and may, whenever an examination is to take place designate a suitable number of persons, either in or not in the official service of the city, to be examiners, and it shall be the duty of such examiners, and, if in the official service, it shall be a part of their official duty, without extra compensation, to conduct such examination as the Commission may direct, and to make return or report thereof to said Commission, and the Commission may at any time substitute any other person, whether or not in such service, in the place of any one so selected; and the Commission may themselves at any time act as such examiners, and without appointing examiners. The examiners at any examination shall not all be members of the same political party.

SEC. 7. *Notice of examinations.* Notice of the time and place and general scope of every examination shall be given by the Commission by publication for two weeks preceding such examination in a daily newspaper of general circulation published in such city, and such notice shall also be posted by said Commission in a con-

POOR COPY

spicuous place in their office for two weeks before such examination. Such further notice of examinations may be given as the Commission shall prescribe.

SEC. 8. *Registers.* From the returns or reports of the examiners, or from the examinations made by the Commission, the Commission shall prepare a register for each grade or class of positions in the classified service of such city of the persons whose general average standing upon examination for such grade or class is not less than the minimum fixed by the rules of such Commission, and who are otherwise eligible; and such persons shall take rank upon the register as candidates in the order of their relative excellence as determined by examination, without reference to priority of time of examination.

SEC. 9. *Promotions.* The Commission shall, by its rules, provide for promotions in such classified service, on the basis of ascertained merit and seniority in service and examination, and shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion. All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examinations; and it shall be the duty of the Commission to submit to the appointing power the names of not more than three applicants for each promotion having the highest rating. The method of examination, and the rules governing the same and the method of certifying, shall be the same as provided for applicants for original appointment.

SEC. 10. *Appointments to classified service.* The head of the department or office in which a position classified under this act is to be filled shall notify said Commission of that fact, and said Commission shall certify to the appointing officer the name and address of the candidate standing highest upon the register for the class or grade to which said position belongs, except that, in cases of laborers where a choice by competition is impracticable, said Commission may provide by its rules that the selections shall be made by lot from among those candidates proved fit by examination. In making such certification sex shall be disregarded, except when some statute, the rules of said Commission or the appointing power specifies sex. The appointing officer shall notify

BLEED THROUGH

said Commission of each position to be filled separately, and shall fill such place by the appointment of the person certified to him by said Commission therefor, which appointment shall be on probation for a period to be fixed by said rules. Said Commission may strike off names of candidates from the register after they have remained thereon more than two years. At or before the expiration of the period of probation the head of the department or office in which a candidate is employed may, by and with the consent of said Commission, discharge him upon assigning in writing his reason therefor to said Commission. If he is not then discharged his appointment shall be deemed complete. To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the Commission, make temporary appointment to remain in force not exceeding sixty days, and only until regular appointments under the provisions of this act can be made.

SEC. 11. *Officers excepted from classified service.* Officers who are elected by the people, or who are elected by the city council pursuant to the city charter, or whose appointment is subject to confirmation by the city council, judges and clerks of election, members of any board of education, the superintendent and teachers of schools, heads of any principal department of the city, members of the law department, and one private secretary of the mayor, shall not be included in such classified service.

SEC. 12. *Removals.* No officer or employe in the classified civil service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before said Civil Service Commission, or by or before some officer or board appointed by said Commission, to conduct such investigation. The finding and decision of such Commission or investigating officer or board, when approved by said Commission, shall be certified to the appointing officer, and shall be forthwith enforced by such officer. Nothing in this act shall limit the power of

POOR COPY

any officer to suspend a subordinate for a reasonable period, not exceeding thirty days. In the course of an investigation of charges each member of the Commission, and of any board so appointed by it, and any officer so appointed, shall have the power to administer oaths and shall have power to secure by its subpœna both the attendance and testimony of witnesses, and the production of books and papers relevant to such investigation. Nothing in this section shall be construed to require such charges or investigation in cases of laborers or persons having the custody of public money, for the safe keeping of which another person has given bonds.

SEC 13. *Reports to Commission.* Immediate notice in writing shall be given by the appointing power, to said Commission, and all appointments, permanent or temporary, made in such classified civil service, and all transfers, promotions, resignations, or vacancies from any cause in such service, and of the date thereof, and a record of the same shall be kept by said Commission. When any office or place of employment is created or abolished, or the compensation attached thereto altered, the officer or board making such change shall immediately report it in writing to said Commission.

SEC. 14. *Investigations.* The Commission shall investigate the enforcement of this act and of its rules, and the action of the examiners herein provided for, and the conduct and action of the appointees in the classified service in its city, and may enquire as to the nature, tenure and compensation of all offices and places in the public service thereof. In the course of such investigations each commissioner shall have power to administer oaths, and said Commission shall have power to secure by its subpœna both the attendance and testimony of witnesses and the production of books and papers relevant to such investigation.

SEC. 15. *Report by Commission.* Said Commission shall, on or before the fifteenth day of January of each year, make to the mayor for transmission to the city council a report showing its own action, the rules in force, the practical effects thereof, and any suggestions it may approve for the more effectual accomplishments of the purposes of this act. The mayor may require a report from said Commission at any other time.

BLEED THROUGH

SEC. 16. *Chief examiner.* Said Commission shall employ a chief examiner, whose duty it shall be, under the direction of the Commission, to superintend any examination held in such city under this act, and who shall perform such other duties as the Commission shall prescribe. The chief examiner shall be *ex officio* secretary of said Commission, under the direction of such Commission; he, as such secretary, shall keep the minutes of its proceedings, preserve all reports made to it, keep a record of all examinations held under its direction, and perform such other duties as the Commission shall prescribe.

SEC. 17. *Officers to aid—Rooms.* All officers of any city which shall have adopted this act shall aid said Commission in all proper ways in carrying out the provisions of this act, and at any place where examinations are to be held, shall allow reasonable use of public buildings for holding such examinations. The mayor of such city shall cause suitable rooms to be provided for said Commission at the expense of such city.

SEC. 18. *Salaries and expenses.* In cities having a population of one hundred thousand inhabitants, or more, each of said commissioners shall receive a salary of three thousand dollars a year; the chief examiner shall receive a salary of three thousand dollars a year. Any person not at the time in the official service of the city, serving as a member of the board of examiners or of a trial board, shall receive compensation for every day actually and necessarily spent in the discharge of his duty as an examiner or a member of the trial board, at the rate of five dollars per day, and said Commission may, in such city, also incur expenses not exceeding five thousand dollars per year, for clerk hire, printing, stationery, and other incidental matters.

In cities having a population of fifty thousand inhabitants and less than one hundred thousand such commissioners shall receive an annual salary of one thousand five hundred dollars each; the chief examiner shall receive an annual salary of one thousand five hundred dollars. Any person not at the time in the official service of the city, serving as a member of the board of examiners, or of a trial board, shall receive compensation for

POOR COPY

every day actually and necessarily spent in the discharge of his duty as an examiner or member of the trial board, at the rate of three dollars per day, and said Commission may, in such city, also incur expenses not exceeding three thousand dollars a year, for clerk hire, printing, stationery, and other incidental matters.

In cities having a population of twenty-five thousand and less than fifty thousand inhabitants, such commissioners shall receive an annual salary of one thousand dollars each, and the chief examiner shall receive an annual salary of one thousand dollars.

In cities having a population of less than twenty-five thousand inhabitants, such commissioners shall receive an annual salary to be fixed by the city council of such cities not to exceed five hundred dollars each; the chief examiner shall receive an annual salary to be fixed by the city council of such cities not to exceed five hundred dollars. In cities having a population of less than fifty thousand inhabitants any person, not at the time in the official service of the city, serving as a member of the board of examiners, or of a trial board, shall receive compensation for every day actually and necessarily spent in the discharge of his duty as an examiner or member of the trial board, at the rate of two dollars per day, and said Commission may, in such city, also incur expenses not exceeding two thousand dollars per year, for clerk hire, printing, stationery, and other incidental matters.

SEC. 19. *Appropriations.* A sufficient sum of money shall be appropriated each year by each city which shall adopt this act, to carry out the provisions of this act in such city. In such cities as shall have already made the annual appropriation for municipal purposes for the current fiscal year, the mayor is authorized and required to pay the salaries and expenses as herein provided for such fiscal year out of the moneys appropriated for contingent purposes by such municipality, or out of any moneys not otherwise appropriated.

SEC. 20. *Frauds prohibited.* No person or officer shall wilfully or corruptly by himself or in co-operation with one or more other persons, defeat, deceive, or obstruct any person in respect to his or her right of exam-

BLEED THROUGH

ination, or corruptly or falsely mark, grade, estimate or report upon the examination or proper standing of any person examined hereunder or aid in so doing, or wilfully or corruptly make any false representation concerning the same, or concerning the person examined, or wilfully or corruptly furnish to any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any person so examined or to be examined, being appointed, employed or promoted.

SEC. 21. *No officer to solicit or receive political contributions.* No officer or employe of such city shall solicit, orally or by letter, or receive or pay, or be in any manner concerned in soliciting, receiving or paying, any assessment, subscription or contribution for any party or political purpose whatever.

SEC. 22. *No person to solicit political contributions from officers or employes.* No person shall solicit, orally or by letter, or be in any manner concerned in soliciting any assessment, contribution or payment, for any party or any political purpose whatever, from any officer or employe in any department of the city government of any city which shall adopt this act.

SEC. 23. *Assessments and contributions in public offices forbidden.* No person shall in any room or building occupied for the discharge of official duties by any officer or employe in any city which shall adopt this act, solicit, orally or by written communication, delivered therein, or in any other manner, or receive any contribution of money or other thing of value, for any party or political purpose whatever. No officer, agent, clerk or employe under the government of such city, who may have charge or control of any building, office or room, occupied for any purpose of said government, shall permit any person to enter the same for the purpose of therein soliciting or delivering written solicitations for receiving or giving notice of any political assessments.

SEC. 24. *Payments of political assessments to public officers prohibited.* No officer or employe in the service of such city shall, directly or indirectly, give or hand over to any officer or employe in said service, or to any senator or representative or alderman, councilman or

POOR COPY

commissioner, any money or other valuable thing on account of or to be applied to the promotion of any party or political object whatever.

SEC. 25. *Abuse of official influence prohibited.* No officer or employe of such city shall discharge or degrade or promote, or in any manner change the official rank or compensation of any other officer or employe, or promise or threaten to do so for giving or withholding or neglecting to make any contribution of money or other valuable thing for any party or political purpose or for refusal or neglect to render any party or political service.

SEC. 26. *Payment for places prohibited.* No applicant for appointment in said classified civil service, either directly or indirectly, shall pay, or promise to pay any money or other valuable thing to any person whatever for or on account of his appointment, or proposed appointment and no officer or employe shall pay or promise to pay, either directly or indirectly, any person any money or other valuable thing whatever for or on account of his promotion.

SEC. 27. *Recommendations in consideration of political service prohibited.* No applicant for appointment or promotion in said classified civil service shall ask for or receive a recommendation or assistance from any officer or employe in said service, or of any person upon the consideration of any political service to be rendered to or for such person or for the promotion of such person to any office of appointment.

SEC. 28. *Abuse of political influence prohibited.* No person while holding any office in the government of such city, or nomination for, or while seeking a nomination for, or appointment to any such office, shall corruptly use or promise to use, either directly or indirectly, any official authority or influence (whether then possessed or merely anticipated) in the way of conferring upon any person, or in order to secure or aid any person in securing any office or public employment, or any nomination, confirmation, promotion or increase of salary upon the consideration or condition that the vote or political influence or action of the last named person or any other shall be given or used in behalf of any candidate, officer or party, or upon any other corrupt condition or consideration.

BLEED THROUGH

SEC. 29. *Auditing officer.* No accounting or auditing officer shall allow the claim of any public officer for services of any deputy or other person employed in the public service in violation of the provisions of this act.

SEC. 30. *Appointments and removals to be certified to the comptroller.* The Commission shall certify to the comptroller or other auditing officers, all appointments to offices and places in the classified civil service, and all vacancies occurring therein, whether by dismissal or resignation or death, and all findings made or approved by the commission under the provisions of section 12 of this act, that a person shall be discharged from the classified civil service.

SEC. 31. *Comptroller to pay Salaries only after certification.* No comptroller or other auditing officer of a city which has adopted this act shall approve the payment of, or be in any manner concerned in paying any salary or wages to any person for services as an officer or employe of such city, unless such person is occupying an office or place of employment according to the provisions of law and is entitled to payment therefor.

SEC. 32. *Paymasters, etc., to pay salaries only after certification.* No paymaster, treasurer, or other officer or agent of a city which has adopted this act shall wilfully pay, or be in any manner concerned in paying any person any salary or wages for services as an officer or employe of such city, unless such person is occupying an office or place of employment according to the provisions of law and is entitled to payment therefor.

SEC. 33. *Compelling testimony of witnesses. Production of books and papers.* Any person who shall be served with a subpœna to appear and testify, or to produce books and papers, issued by the Commission or by any commissioner or by any board or person acting under the orders of the Commission in the course of an investigation conducted either under the provisions of section 12 or section 14 of this act, and who shall refuse or neglect to appear or to testify, or to produce books and papers relevant to said investigation, as commanded in such subpœna, shall be guilty of a misdemeanor, and shall on conviction, be punished as provided in section 34 of this act. The fees of witnesses for at-

POOR COPY

tendance and travel shall be the same as the fees of witnesses before the circuit courts of this state, and shall be paid from the appropriation for the expenses of the Commission. Any circuit court of this state, or any judge thereof, either in term time or vacation, upon application of any such commissioner, or officer or board, may in his discretion compel the attendance of witnesses, the production of books and papers, and giving of testimony before the Commission, or before any such commissioner, investigating board or officer, by attachment for contempt or otherwise, in the same manner as the production of evidence may be compelled before said court. Every person who, having taken an oath or made affirmation before a commissioner or officer appointed by the Commission authorized to administer oaths shall swear or affirm wilfullfully, corruptly and falsely shall be guilty of perjury, and upon conviction shall be punished accordingly.

SEC. 34. *Penalties.* Any person who shall wilfully, or through culpable negligence violate any of the provisions of this act, or any rule promulgated in accordance with the provisions thereof, shall be guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine of not less than fifty dollars and not exceeding one thousand dollars, or by imprisonment in the county jail for a term not exceeding six months, or both such fine and imprisonment in the discretion of the court.

SEC. 35. *Penalties—Disqualification to hold office.* If any person shall be convicted under the next preceding section, any public office or place of public employment, which such person may hold shall by force of such conviction be rendered vacant and such person shall be incapable of holding any office or place of public employment for the period of five years from the date of such conviction.

SEC. 36. *What officers to prosecute.* Prosecutions for violations of this act may be instituted either by the attorney general state's attorney for the county in which the offence is alleged to have been committed, or by the Commission, acting through special counsel. Such suits shall be conducted and controlled by the prosecuting officers who institute them, unless they request the aid of other prosecuting officers

BLEED THROUGH

SEC. 37. *Repeal.* All laws or parts of laws which are inconsistent with this act, or any of the provisions thereof, are hereby repealed.

SEC. 38. *Adoption.* The electors of any city now existing or hereafter existing in this state, may adopt and become entitled to the benefit of this act in the following manner: Whenever one thousand of the legal voters of such city, voting at the last preceding election shall petition the judge of the county court of the county, in which such city is located, to submit to a vote of the electors of such city the proposition as to whether such city and the electors thereof shall adopt and become entitled to the benefits of this act, it shall be the duty of such county court to submit such proposition accordingly at the next succeeding general state, county or city election, and if such proposition is not adopted at such election the same shall in a like manner be submitted to a vote of the electors of such city by such county court upon like application at any general state, county or city election, thereafter, and an order shall be entered of record in such county court submitting such proposition as aforesaid.

If one thousand shall exceed one-eighth of the legal voters of any such city voting at the last preceding election, then such petition or application need not be signed or made by more than one-eighth of the legal voters of such city voting at the last preceding election.

SEC. 39. *Notice of election.* The judge of such county court shall give at least ten days notice of the election at which such proposition is to be submitted by publishing such notice in one or more newspapers published within such city for at least five times, the first publication to be at least ten days before the day of the election; and if no newspaper is published in such city, then by posting at least five copies of such notice in each ward at least ten days before such election. Such election shall be held under the election law in force in such city, except as herein otherwise provided. The proposition so to be voted for shall appear in plain, prominent type at head of every ticket and preceding the names of persons to be voted upon for any office at such election. If a majority of the votes cast upon such

POOR COPY

proposition shall be for such proposition, this act shall thereby be adopted by such city, and the mayor shall thereupon issue a proclamation declaring this act in force in such city.

SEC. 40. *Emergency.* Whereas, an emergency exists for the immediate taking effect of this act, therefore it shall be in force from and after its passage.

PROCLAMATION BY THE MAYOR.

Whereas, Under the provisions of an Act of the General Assembly of the State of Illinois, entitled "An Act to Regulate the Civil Service of Cities," approved and in force March 20, 1895, there was duly submitted to a vote of the electors of the City of Chicago at the general city election held April 2, 1895, the proposition whether said city and its electors should adopt and become entitled to the benefits of said act; and

Whereas, A large majority of the votes cast at such election were cast for such proposition, and in favor of the adoption of said act; now, therefore, as required by said act, I, George B. Swift, Mayor of the City of Chicago, hereby declare that said act is in full force and effect in the City of Chicago from and after this date, and that in accordance with the provisions thereof, I have this day appointed as the three Civil Service Commissioners, under said act, John M. Clark, for the term of three years; Robert A. Waller, for a term of two years; and Christoph Hotz,* for a term of one year.

Dated, July 1, 1895. GEORGE B. SWIFT,
Mayor.

*On June 29, 1896, Christoph Hotz was appointed by the mayor to succeed himself, as Commissioner, for the term of three years, from July 1, 1896. On the accession of Mr. Harrison as mayor Mr. Waller resigned, and the mayor removed Messrs. Clark and Hotz, and appointed Adolf Kraus, Hempstead Washburne and Dudley Winston; who were the Commissioners as alleged in the petition.

An act to amend an act entitled "An act to regulate the civil service in cities." Approved March 20, 1895.

SECTION 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That an act entitled "An act to regulate the civil service in cities," be amended by the addition of a section to be known as section 10½, which section shall read as follows:

BLEED THROUGH

SEC. 10½. Persons who were engaged in the military or naval service of the United States during the years 1861, 1862, 1863, 1864 or 1865, and who were honorably discharged therefrom, shall be preferred for appointments to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such office, and it shall be the duty of the examiner or commissioners certifying the list of eligibles who have taken the examinations provided for in this act, to place the name or names of such persons at the head of the list of eligibles certified for appointment.

Approved May 6, 1897.

POOR COPY

ASSIGNMENT OF ERRORS.

And now comes Joseph Kipley, the plaintiff in error above named, by Charles S. Thornton, his attorney, and shows unto the Court that in the record of the Supreme court of the state of Illinois, in that certain cause wherein the People of the state of Illinois, on the relation of Edward C. Akin, attorney general, ask for a writ of mandamus against Joseph Kipley, superintendent of police of the city of Chicago, and Adolph Kraus, Hempstead Washburne and Dudley Winston, civil service commissioners, which writ was awarded by order of said Supreme court of Illinois, of date December 22, 1897; from which order the said Kipley, plaintiff in error, has sued out of the Supreme court of the United States a writ of error:

There is manifest error in this:

First. The Supreme court of Illinois erred in granting leave to the relator to file his petition therein and in ruling the respondents to answer the same.

Because that certain act of the General Assembly of the state of Illinois entitled "An act to regulate the civil service of cities," approved and in force March 20, 1895, which it is sought by said petition to enforce, is null and void, the same being in violation of certain provisions of the Constitution of the state of Illinois and also of certain other provisions of the Constitution of the United States of America; that is to say, for the following reasons:

1. It abridges the privileges and immunities of citizens of the United States, in that it renders all citizens who do not apply for office or for place of employment ineligible to appointment or for selection therefor, whereas it is the

BLEED THROUGH

right and privilege of every citizen to hold office and serve the public.

2. The said act of March 20, 1895, deprives a duly elected and qualified officer of the right to select his subordinates and provide the requisite agencies for performing his official duties, thus abridging the rights, privileges and immunities belonging and guaranteed by the said Constitutions respectively to every citizen thereof.

3. The said act of March 20, 1895, provides for the invasion of the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.

4. The said act of March 20, 1895, purports to prescribe substantially for the criminal trial of public officers for nonfeasance, for misfeasance for malfeasance in office, and for the infliction of the penalties therefor, of deprivation of office, and incapacity to hold office thereafter, by a non-judicial body, and in such a manner that the accused shall not enjoy the right to a speedy and public trial by an impartial jury, of the state or district wherein the crime shall have been committed; and without informing the accused of nature and cause of accusation; and without confronting the accused with the witnesses against him; and without permitting the accused to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for the defense.

5. That said act denies to the citizen the freedom of political action, making it highly penal for the citizen to take part in party politics.

6. That said act of March 20, 1895, provides for the creation and maintenance of an office-holding class, at

POOR COPY

the expense of the people who are excluded therefrom, by the operation of the said act.

7. And generally said act of March 20, 1895, is directly in contravention of the right of that clause of the United States Constitution, which prescribes that

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the laws."

8. And lastly, plaintiff in error avers that the said act of March 20, 1895, generally denominated the "Civil Service Act," is absolutely null and void, because the same purports to require the civil officers of the city of Chicago to undergo tests as qualification for office and public employment in addition to the requirement of Section 25 of Article 5 of said Constitution of the state of Illinois, not only in contravention thereof, but of the general principles of popular government, and because it provides for a political test for the said Commissioners respectively therein named, and because, further, the same is in contravention of Section 22 of Article 4 of said constitution, as well as many other provisions of said state Constitution, and of the Constitution of the United States.

Second. The Supreme court of Illinois erred in refusing said Kipley leave to withdraw his plea *puis darrein continuance*, and for the same reasons as aforesaid.

Third. The Supreme court of Illinois erred in refusing the said Kipley leave to amend his answer, and for the same reasons as aforesaid.

BLEED THROUGH

Fourth. The Supreme court of Illinois erred in refusing said Kipley leave to file a supplemental answer, and for the same reasons as aforesaid.

Fifth. The Supreme court of Illinois erred in denying the respondent's motion to quash the rule to answer and to discharge the respondents therefrom and to dismiss the proceedings; and for the same reasons as aforesaid.

Sixth. The Supreme court of Illinois erred in granting the order or judgment of December 22, 1897, awarding the writ of mandamus as in the said record set forth; and for the same reasons as aforesaid.

Wherefore the said plaintiff in error doth ask this Honorable court, the premises being seen, that the said errors be corrected, and that the order or judgment of the Supreme court of Illinois of December 22, 1897, of which he complains, be reversed, and that such other proceedings be had herein as to this Honorable court may seem meet and to justice may appertain.

CHAS. S. THORNTON,
Attorney for Plaintiff in Error.

POOR COPY

BRIEF.

That certain act of the General Assembly of the State of Illinois entitled "An Act to regulate the Civil Service of Cities" approved and in force March 20, 1895, is unconstitutional and void for the following reasons:

POINTS.

I.

It abridges the privileges and immunities of citizens of the United States, in that it renders all citizens who do not apply for office or for place of employment ineligible to appointment or for selection therefor, whereas it is the right and privilege of every citizen to hold office and his corresponding duty to serve the public.

Chi., B. & Q. R. R. Co. v. *Chicago*, 166 U. S., 226.

1. Applicants, alone, can be examined and thus made eligible. These must of necessity constitute a very small minority; hence the majority is rendered ineligible by this Civil Service Act.

By § 6 (p. 13, *supra*), this act provides that applicants shall be subjected to examination; that the examination shall be public; that it shall be free, with certain limitations (but this does not make it open to those who do not apply); that it shall be competitive, that is that those who succeed in establishing their eligibility by meeting the tests prescribed by the rules to be made by the commission shall compete for "the positions to which they "seek to be appointed" among themselves and by means

BLEED THROUGH

of such competition only secure appointment to office or place of employment. Applicants may thus become eligible; eligibles may thus become competitors; the successful competitors, may thus respectively secure an office or place of employment. Thus this act provides the machinery, which deprives the local officers of all power not only of appointment but of amotion or removal. Where does this power of appointment reside under this act? The commissioners, who are to classify, to make the rules, to examine and to test "applicants, office seekers, place hunters" only, are required to certify the eligible, that certain competitor who stands "highest"; and the hitherto appointing power is to designate this competitor for the place or office which is to be filled. This act thus takes away the liberty and equality which appertain to citizenship.

2. Merit and fitness, thus ascertained, by competition are made the sole *criteria;* competitive skill prevails and is thus made to supersede; choice by the people, or by those representing the people thus becomes an impossibility. Character, the true criterion of individual merit and fitness is of little or no avail. Experience in the administration of individual concern as well as of public affairs has no weight. Industry and integrity cease to be requisite. Honors are disregarded.

3. By Section 12, the right of amotion or power of removal is taken away except for cause, which is in every instance to be ascertained by investigation "upon "written charges and after an opportunity to be heard" in the officer's own defense. This is practically a life tenure. This completes the machinery for the applicant to get into office and to permanently fix him there. The prescribed examination made necessary to eligibility

POOR COPY

opens the door it is true to all who apply; but before the passage of the act all citizens were equal before the law, all were eligible; now by reason of this law all at once are made ineligible, for to become eligible the aspirant must make application under the rules.

Mr. Justice BRADLEY, in speaking of the offices appertaining to the Federal Government, says:

"The offices of the government do not belong to the legislative department to dispose of on any conditions it may choose to impose. The Legislature creates most of the offices it is true, and provides compensation for the discharge of their duties; but that is its duty to do, in order to establish a complete organization of the functions of government. When established, the offices are, or ought to be, open to all. They belong to the United States and not to Congress; and every citizen having the proper qualifications has a right to accept office, and to be a candidate therefor. This is a fundamental right of which the Legislature can not deprive the citizen, nor clog its exercise with conditions that are repugnant to his other fundamental rights."

Ex parte Curtis, 106 U. S., 376.

Per Justice SANFORD:

"The constitution giving the right of election and the right of appointment, these rights consisting essentially in the freedom of choice, and the constitution also declaring that certain persons are not eligible to office, it follows from these powers and provisions that all other persons are eligible. Eligibility to office is not declared as a right or principle by any express terms of the constitution, but it resules as a just deduction from the express powers and provisions of the system. The basis of the principle is the absolute liberty of the electors and the appointing authorities to choose and to appoint any person who is not made ineligible by the constitution. Eligibilty to office, therefore, belongs not exclusively or specialy to electors enjoying the right of suffrage. It belongs equally to all persons whomsoever not excluded by the constitution. I, therefore, conceive it to be en-

BLEED THROUGH

tirely clear that the Legislature can not establish arbitrary exclusions from office, or any general regulation requiring qualifications which the constitution has not required."

The learned chancellor thus continues:

"If, for example, it should be enacted by law, that all physicians, or all persons of a particular religious sect, should be ineligible to public trusts; or that all persons not possessing a certain amount of property, should be excluded; or that a member of the assembly must be a freeholder; any such regulation would be an infringement of the constitution; and it would be so, because, should it prevail, it would be in effect, an alteration of the constitution itself."

Barker v. *The People*, 3 Cowen, pp. 703, 704.

In speaking of the New York Civil Service Act, Chief Justice RUGER says:

"The vice of this legislation is that it is directed at the appointing power alone and enjoins it from the exercise of that power except under conditions and restrictions imposed by the legislative will."

The People ex rel. Killeen v. *Angle*, 109 N. Y., 564.

The Illinois act before us goes further and creates the machinery by which the power of appointment to public office is placed in the hands of a few who are required to compete for the same as we have above stated.

The chief corner stone of all our institutions is majority rule. The will of the majority legitimately expressed must be carried out. In the language of Mr. Justice MAGRUDER:

"An election is an expression of the popular will, which necessarily has two sides to it. At every election there are those who vote for some candidate or measure, and there are those who vote against such can-

POOR COPY

didate or measure. In republican governments men arrange themselves into these two classes according to their political views and their party preferences."

The People v. *Hoffman*, 116 Ill., p. 607.

In the City of Chicago, with a population of nearly two millions, more than three hundred thousand people are doubtless by the Constitution and other laws of the State of Illinois, eligible to any place of public preferment from the Mayor to patrolman, from councillor to page, or messenger. Can three hundred thousand people, thus eligible, apply to the Civil Service Commission, created by the said act, to be tested by its rules? Is it possible for such commission to provide for the examination of all who are eligible for public office or place of public employment? We insist that citizenship carries with it, not only the right to vote, but also the right to be voted for or to be appointed to a position in the civil service of the city, the town, the village, the county, the state or the nation, and that any law which compels or requires the citizen, having such right, to submit himself for examination as an office seeker to such test in this respect abridges his highest rights, privileges and immunities.

We contend further that this act divides practically all the persons in Chicago who were eligible to public office and places of public employment, into three classes, namely,

First. Into those who do not submit themselves to examination, who are absolutely precluded by the act from holding any office or place of public employment to be filled by appointment.

Second. Into the civil officers who are elected by the

BLEED THROUGH

people or who are elected by the City Council pursuant to the city charter or whose appointment is subject to confirmation by the City Council, judges and clerks of election, members of any board of education, superintendent and teachers of schools, heads of any principal department of the city, members of the law department and one private secretary of the Mayor who are by Sections 3 and 11 of said act, not only excepted but precluded therefrom.

Third. All other officers and employes of the city not included within the terms of Section 11 of said act.

And that such classification is the result of an arbitrary mandate which cannot be considered, in any view of the case, as legitimate legislation.

In *Millett* v. *The People*, 117 Ill., 294, the question was presented:

"Whether it is competent for the General Assembly to single out owners and operators of coal mines as a distinct class, and provide that they shall bear burdens not imposed on other owners of property or employers of laborers, and prohibit them from making contracts which it is competent for other owners of property or employers of laborers to make."

In considering this question Mr. Justice SCHOLFIELD in delivering opinion of the court says:

"It is declared in Section 2, Article 2, of our constitution, that 'no person shall be deprived of life, liberty or property without due process of law.' And Section 12 of the same article provides that private property shall not be taken or damaged for public use without just compensation The words, 'due process of law,' in this connection are held to be synonymous with the words 'the law of the land.' Cooley on Const. Lim. (1st Ed.), pp. 352–3. And this means general public law, binding upon all the members of the commu-

POOR COPY

nity, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals. *Jones* v. *Reynolds*, 2 Tex., 251. See, also, *Wyenheimer* v. *The People*, 13 N. Y., 432; *Vanzandt* v. *Waddell*, 2 Yerger, 269."

"Every one," says Cooley (Const. Lim. 1st Ed., p. 391, "has a right to demand that he be governed by general rules, and a special statute that singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate, but an arbitrary mandate, unrecognized in free government. Mr. Locke has said of those who make the laws: 'They are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor—for the favorite at court and the countryman at plough.' And this may justly be said to have become a maxim in the law by which may be tested the authority and binding force of legislative enactments."

And, again the same authority says (p. 393):

"The doubt might also arise whether a regulation made for any one class of citizen, entirely arbitrary in its character, and restricting their rights, privileges or legal capacities in a manner before unknown to the law, could be sustained. Distinction in these respects should be based upon some reason which renders them important—like the want of capacity in infants and insane persons; but if the Legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even if it did not come in conflict with express constitutional provisions. The man or the class forbidden the acquisition or enjoyment of property in the manner permitted to the community at large, would be deprived of liberty in particulars of primary importance to his or their pursuit of happiness."

BLEED THROUGH

See, also, *Budd* v. *The State*, 3 Hump., 483, where one of the sections of the act incorporating the Union Bank, which provided that if any of the officers, agents or servants of that bank should embezzle the funds of the bank, or make false entries, they should be guilty of felony, was held unconstitutional, because it did not apply generally to officers, agents or servants of banks committing like offenses. And *Wally's Heirs* v. *Kennedy*, 2 Yerg., 554, where an act authorizing the court to dismiss Indian Reservation case where prosecuted for the use of another, was held unconstitutional. In the last case the court said:

"The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, the mass of the community and those who made the law, by another; whereas a like general law, affecting the whole community equally, could not have passed."

On like principle is, also, *The People* v. *Marx*, 99 N. Y., 377.

See, also,

Frorer v. *The People*, 141 Ill., 171.

Braceville Coal Co. v. *The People*, 147 *id.*, 66.

Richie v. *The People*, 155 *id.*, 98.

Eden v. *The People*, 296 *id.*, 161.

The classification which the act itself makes can not be said to be based upon any sound reason or natural cause, but upon the arbitrary will of the Legislature. Mr. Binney says:

POOR COPY

"The underlying principle of general legislation is the same in all cases. A law applying to and embracing within its operation all persons or things which are in, or which may come into, like situations and circumstances, is general, no matter what the persons or things may be, either in character or in number. Laws in regard to railroads, mechanics' liens, landlords' liens, large cities, small cities, etc., all stand on the same ground in this respect."

Binney on Restrictions Upon Local and Special Legislation, pages 54, 55.

He further states the rules for classification which are supported by judicial decisions. Two of these rules, which are applicable in this discussion, are (page 59):

"1st. All classification must be based upon substantial distinctions which make one class really different from another.

"4th. To whatever class a law may apply it must apply equally to each member thereof, except only where its application is affected by the existence of prior unrepealed local or special laws."

The Supreme Court of New Jersey, in speaking of those substantial distinctions which make one class really different from another, used the following language:

"The true principle requires something more than a designation by such characteristics as will serve to classify, for the characteristics which thus serve as a basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction having a reference to the special matter of the proposed legislation between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree, at least, account for or justify the restrictions of the legislation."

State v. *Hammer*, 42 N. J. L., 436–440.

BLEED THROUGH

Is the classification made by the Civil Service Act of Illinois, hereinbefore set forth, based upon substantial or natural reasons? The whole controversy here arises out of the difficulty in the construction of that portion of the act which attempts to prescribe the classification. The Civil Service Commission divide it into the unclassified service and the classified service.

(See Rec., 18.)

Sections 3 and 11 of the act, pages 4 and 7, *supra*, are those which prescribe for the classified service and the exceptions from the classified service, which the Civil Service Board classify into the unclassified service and the classified service. After thus taking out all the principal officers of the city who are elective or whose confirmation is required by the City Council, and others specified in Section 11, the "Heads of any principal department of the city," members of the law department and one private secretary to the Mayor, over which the Civil Service Board has no jurisdiction, and setting them aside, the said Civil Service Board by its rule prescribes as follows:

"The offices and places above named shall constitute the unclassified service."

This is "Rule 1" of the board.

(See Rec., 18.)

We ask what reason, substantial or natural can be given for this exclusion of all the principal officers of the City of Chicago from the rules, requirements and restrictions of this act? Suppose, for example, that the Mayor has two private secretaries; the one will be in the unclassified service, the other in the classified service. What reason substantial or natural

POOR COPY

would there be for making one secretary subject to examination and for leaving the other secretary free from all the provisions of the said act? And so may we one by one interrogate as to each and every one of the incumbents of the excluded offices specified in Section 11.

If any one word in the English language has a well defined meaning it is the word "heads." The controversy here arises out of the construction of this act as to the meaning of this word. The learned Judge who gives the dissenting opinion to be found in this record (See Rec., 134, 135) characterizes this act as being in necessity of preservatives. Judge BOGGS says:

"The rejection of a portion of an act is only to be resorted to as a desperate and heroic remedy necessary to to be employed for the preservation of the act itself."

He continues:

"It is a universal rule of construction so frequently declared that the citation of authorities is superfluous, that the words of a statute of common use are to be taken in their natural, plain, obvious and ordinary signification 'and that a plain common sense interpretation of such words are to be accepted rather than a refined and technical grammatical construction.'

"It must be conceded the meaning of the words 'heads of a department,' is not, in popular and common acceptation, at all a matter of doubt. It does not mean the 'head' alone of the department but the chief or principal governing officers thereof."

This was our construction of this act in this particular and we so in our official capacity advised the plaintiff in error in his official capacity, and in resisting the relator's application for a mandamus, the plaintiff in error also had the opinion of the Civil Service Commission itself, which body is by the act in terms authorized to prescribe the rules for carrying out the provisions thereof.

BLEED THROUGH

But classification—the creating of an office-holding class, a class of eligibles who can as occasion demands call for the certification, the judgment, the decision of this body that they have merit and fitness which entitle them respectively as a vacancy or opening may occur, to fill it, and when once in, nothing but the certification of this same body that there is cause for removal, can oust them from their several positions, is by the act made the main duties of the Civil Service Commission.

See Section 3, page 12, *supra*.

But now comes the Supreme Court of the state, and in violation of all the rules of English grammar, changes the legislative classification as well as the classification of the board to which it has delegated the entire power of classification. Is it not plain that such an act bears not the semblance of legitimate legislation? Tell us if you can in reading this act from the enacting to the emergency clause, what officers, what employes of the City of Chicago are subject to the provisions of the act? Is it possible that the Legislature of a sovereign state can leave the whole subject-matter of an act of so great importance as that which purports to provide for an entire change of the civil service of its cities in regard to the appointment, the qualification and the removal of the public officers and the employes of such city to the discretion of a commission? Is it possible for such Legislature to clothe the said commission with power to make rules to carry out the purposes of the act, for examination, for appointments, and for removals and from time to time to make changes in such rules? Do such rules have the force and effect of statutes? In this record we have the Civil Service Rules which the Civil Service Commission of the City

POOR COPY

of Chicago have adopted. The relator attached copies thereof to his petition and now triumphantly brings them before this court as though they had the force and effect respectively of the said Civil Service Act.

See Rec., 18–39.

We insist that this act is absolutely null and void on its face; that it is not a law; that the whole subject matter thereof is left out of it; that the classified Civil Service of the City of Chicago cannot be found within it nor according to it. The act is like the play of Hamlet with Hamlet left out. Illustrative of our argument may we ask: Then, when you change the construction of this act which the legal department of the City of Chicago had placed upon it, which the Civil Service Commission had given to it, which the plaintiff in error had followed when he proceeded to regard his subordinates, the four inspectors, and the captains of police as respectively heads of his department, each having miles of territory, stations and Police Courts with hundreds of policemen in subordination, so as to include them within its provisions, do you not abridge the rights, privileges and immunities of such subordinates respectively?

The right of every policeman, the right of every individual to appointment and to promotion upon the police force of the city, existing without such act, is by the alteration of a letter in the act itself abridged, and thenceforward made subservient to the restrictions, requirements and the rules of the Civil Service Commission. Instead of a statute duly enacted by the General Assembly, approved and published as the law of the land, making a certain and well defined classification which all who read may understand, these policemen are com-

BLEED THROUGH

pelled to resort to the shifting sands of the Civil Service Rules.

We now come to the prohibitory clause of Section 3, as follows: "And no appointments to any of such offices "or places shall be made except under and according to "the rules hereinafter mentioned."

Section 4 prescribes:

"Said Commission shall make rules to carry out the purposes of this act and for examination, appointments add removals in accordance with its provisions and the Commission may from time to time make changes in the original rules." *Id.*

It will thus be seen that the entire scope of the act is to rest the classification of the officers and employes of the city on the rules of a mere commission, which is empowed to make such rules for examination of all the office seekers in the city, for appointment to office and removals therefrom, with full power and authority to make changes in these rules from time to time in its discretion. But if such rules be laws they are within the inhibitory provisions of the Fourteenth Amendment to the United States Constitution.

Furthermore, it is the duty of every citizen whenever elected or appointed to office to accept the same and to serve the public to the best of his ability.

It is an offense at common law for a person chosen to a public office to refuse to serve.

Edwards v. *United States*, 103 U. S., 471.

A municipal corporation may impose a penalty for failure or refusal to serve.

City of London v. *Vanacker*, 1 Ld. Raym., 496.

POOR COPY

The person so refusing is also liable to criminal prosecution.

Rex v. *Lone*, 2 Str., 920.
Rex v. *Jones*, *Id.*, 1146.
Rex v. *Burder*, 4 T. R., 778.
Rex v. *Bower*, 1 B. & C., 585.
Rex v. *Whitwell*, 5 T. R., 85.

A public officer incurs the penalty by resignation.

Connor v. *Mayor*, 2 Sand., 355; per Sandford J., p. 371.

Mandamus will also lie to compel him to serve.

Rex v. *Mayor*, 4 Dougl., 14.
Rex v. *Layland*, 3 M. & S., 184.
Rex v. *Hungerford*, 11 Mod., 142.

It is the doctrine of the common law that every citizen, in peace as well as in war, owes his services to the state when demanded. This right stands on at least as high a necessity as the right of eminent domain.

London v. *Headon*, 76 N. C., 72.
State v. *McEntyre*, 3 Ired., 171.
Smith v. *Moore*, 90 Ind., 294.

That public office is a public trust; that the election or selection of an individual for the place of public trust is a privilege, no one can deny. It is the duty of every citizen to co-operate with his fellow citizens of his own choice in the promotion of his own political views and the carrying out of measures.

Says Mr. Justice BRADLEY:

"To take an interest in public affairs and to further promote those principles which are believed to be vital or important to the general welfare is every citizen's

BLEED THROUGH

duty. It is a just complaint that so many good men abstain from taking such an interest."

106 U. S., page 376.

The theory of our government is that every citizen is a partner in the Republic; to exclude him from the privilege of bearing the burdens which office imposes, and enjoying the honors thereof, deprives him of inalienable rights which the Constitutions of the United States and the several states respectively guarantee.

II.

The said act of March 20, 1895, deprives a duly elected and qualified officer of the right to select his subordinates and provide the requisite agencies for performing his official duties, thus abridging the rights, privileges and immunities belonging and guaranteed by the said constitutions respectively to every citizen thereof.

Majority rule is the chief corner stone of all our institutions. The will of the majority legitimately expressed must be carried out. It is the guide in all political action. Thwart this will by Civil Service laws and Civil Service rules or otherwise and you contravene the far reaching and salutary provisions of the Fourteenth Amendment to the Constitution.

The rule adopted by General Washington is the correct one applicable and apposite here.

Words of Washington written in 1795 viz. (Spark's Washington, XI, 74):

"I shall not whilst I have the honor to administer the government bring a man into any office of consequence knowingly whose political tenets are adverse to the

POOR COPY

measures which the general government are pursuing; for this in my opinion would be a sort of political suicide."

Change this rule as it is changed by this Civil Service Act, and the fundamental rule of our Civil Government is gone; the rights of the majorities are abridged. Is it any the less political suicide for a Legislature, for a state to change this essential rule than for the chief magistrate of the nation to do so?

III.

The said act of March 20, 1895, provides for the invasion of the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.

We will consider this assignment of error under and together with Point VII, *infra*.

IV.

The said act of March 20, 1895, purports to prescribe substantially for the criminal trial of public officers for nonfeasance, for misfeasance, for malfeasance in office, and for the infliction of the penalties therefor, of deprivation of office and incapacity to hold office thereafter by a non-judicial body, and in such a manner that the accused shall not enjoy the right to a speedy and public trial by an impartial jury of the state or district wherein the crime shall have been committed; and without informing the accused of nature and cause of accusation; and without confronting the accused with the witnesses against him; and without permitting the accused to have

BLEED THROUGH

compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for the defense.

We shall consider this assignment of error under and together with point VII, *infra*.

V.

That said act denies the freedom of political action, making it highly penal for the citizen to take part in party politics.

Sections 21, 22, 23 and 24, respectively (see pages 19 and 20, *supra*), tested by the decision of this court in *ex parte Curtis* are plainly within the restrictions so clearly stated by Mr. Justice BRADLEY in that case. The Civil Service Act of Illinois is more than a regulation for public officers and between themselves it absolutely prohibits any officer or employe of the city from paying as well as soliciting or receiving political contributions; and it also prohibits any person from soliciting from any officer or employe of the city any contributions for political purposes. The opinion of Mr. Justice BRADLEY is so in point here that we shall repeat it after reproducing the said sections:

"Section 21. *No officer to solicit or receive political contributions.* No officer or employe of such city shall solicit orally or by letter, or receive or pay, or be in any manner concerned in soliciting, receiving or paying any assessment, subscription or contribution for any party or political purpose whatever."

"Section 22. *No person to solicit political contributions from officers or employes.* No person shall solicit, orally or by letter, or be in any manner concerned in soliciting any assessment, contribution or payment for any party or any political purpose whatever, from any

POOR COPY

officer or employe in any department of the city government of any city which shall adopt this act."

"Section 23. *Assessments and contributions in public offices forbidden.* No person shall in any room or building occupied for the discharge of official duties by any officer or employe or employe in any city, which shall adopt this act, solicit, orally or by written communication, delivered therein, or in any other manner, or receive any contribution of money or other thing of value, for any party or political purpose whatever."

"No officer, agent, clerk or employe under the government of such city, who may have charge or control of any building, office or room, occupied for any purpose of said government, shall permit any person to enter the same for the purpose of therein soliciting or delivering written solicitations for receiving or giving notice of any political assessments."

"Section 24. *Payments of political assessments to public officers prohibited.* No officer or employe in the service of such city shall, directly or indirectly, give or hand over to any officer or employe in said service, or to any senator or representative or alderman, councilman or commissioner, any money or other veluable thing, on account of or to be applied to the promotion of any party or political object whatever."

The following is the opinion of Mr. Justice BRADLEY above referred to:

"I can not concur in the opinion of the court in this case. The law under which the petitioner is imprisoned makes it a penal offense for any executive officer or employe of the United States, not appointed by advice of the senate (an unimportant distinction, so far as the power to make the law is concerned), to request, give to or receive from any other officer or employe of the government any money, or property, or other thing of value for political purposes; thus, in effect, making it a condition of accepting any employment under the government that a man shall not, even voluntarily and of his own free will, contribute in any way through or by the hands of any other employe of the government to the political cause which he desires to aid and promote. I do not believe that Congress has any right to impose such

BLEED THROUGH

a condition upon any citizen of the United States. The offices of the government do not belong to the legislative department to dispose of on any condition it may choose to impose. The Legislature creates most of the offices, it is true, and provides compensation for the discharge of their duties; but that is its duty to do, in order to establish a complete organization of the functions of government. When established, the offices are, or ought to be, open to all. They belong to the United States, and not to Congress; and every citizen having the proper qualifications has the right to accept office, and to be a candidate therefor. This is a fundamental right of which the Legislature can not deprive the citizen, nor clog its exercise with conditions that are repugnant to his other fundamental rights. Such a condition I regard that imposed by the law in question to be. It prevents the citizen from co-operating with other citizens of his own choice in the promotion of his political views. To take an interest in public affairs, and to further and promote those principles which are believed to be vital or important to the general welfare, is every citizens' duty. It is a just complaint that so many good men abstain from taking such an interest. Amongst the necessary and proper means for promoting political views, or any other views, are association and contribution of money for that purpose both to aid discussion and to disseminate information and sound doctrine. To deny to a man the privilege of associating and making joint contributions with such other citizens as he may choose, is an unjust restraint of his right to propagate and promote his views on public affairs. The freedom of speech and of the press, and that of assembling together to consult upon and discuss matters of public interest, and to join in petitioning for a redress of grievances, are expressly secured by the constitution. The spirit of this clause covers and embraces the right of every citizen to engage in such discussions, and to promote the views of himself and his associates freely, without being trammeled by inconvenient restrictions. Such restrictions, in my judgment, are imposed by the law in question. Every person accepting any, the most insignificant, employment under the government must with-

POOR COPY

draw himself from all societies and associations having for object the promotion of political information or opinions. For if one officer may continue his connection, others may do the same, and thus it can hardly fail to happen that some of them will give and some receive funds mutually contributed for the purposes of the association. Congress might just as well, so far as the power is concerned, impose, as a condition of taking any employment under the government, entire silence on political subjects, and a prohibition of all conversation thereon between government employes. Nay, it might as well prohibit the discussion of religious questions, or the mutual contribution of funds for missionary or other religious purposes. In former times, when the slavery question was agitated, this would have been a very convenient law to repress all discussion of the subject on either side of Mason and Dixon's line. At the present time any efficient connection with an association in favor of a prohibitory liquor law, or of a protective tariff or of greenback currency, or even for the repression of political assessments, would render any government official obnoxious to the penalties of the law under consideration. For all these questions have become political in their character, and any contribution in the aid of the cause would be contributions for political purposes. The whole thing seems to me absurd. Neither men's mouths nor their purses can be constitutionally tied up in that way. The truth is, that public opinion is oftentimes like a pendulum, swinging backward and forward to extreme lengths. We are not unfrequently in danger of becoming purists, instead of wise reformers, in particular directions; and hastily pass inconsiderate laws which overreach the mark they are aimed at or conflict with rights and privileges that a sober mind would regard as indisputable. It seems to me that the present law, taken in all its breadth, is one of this kind.

The Legislature may, undoubtedly, pass laws excluding from particular offices those who are engaged in pursuits incompatible with the faithful discharge of the duties of such office. That is quite another thing.

The Legislature may make laws ever so stringent to prevent the corrupt use of money in elections, or in po-

BLEED THROUGH

litical matters generally, or to prevent what are called political assessments on government employes, or any other exercise of undue influence over them by government officials or others. That would be all right. That would clearly be within the province of legislation.

It is urged that the law in question is intended, so far as it goes, to effect this very thing. Probably it is. But the end does not always sanctify the means. What I contend is, that in adopting this particular mode of restraining an acknowledged evil, Congress has overstepped its legitimate powers and interfered with the substantial rights of the citizen. It is not lawful to do evil that good may come, there are plenty of ways in which wrong may be suppressed without resorting to wrongful measures to do it. No doubt it would often greatly tend to prevent the spread of a contagious and deadly epidemic, if those first taken should be immediately sacrificed to the public good. But such a mode of preventing the evil would hardly be regarded as legitimate in a Christian country.

I have no wish to discuss the subject at length but simply to express the general grounds on which I think the legislation in question is *ultra vires*. Though as much opposed as anyone to the evil sought to be remedied, I do not think the mode adopted is a legitimate or a constitutional one, because it interferes too much with the freedom of the citizen in the pursuit of lawful and proper ends. If similar laws have been passed before, that does not make it right. The question is, whether the present law, with its sweeping provisions, is within the just powers of Congress. As I do not think it is, I dissent from the opinion of the majority of the court."

106 U. S., pages 376–379.

Chief Justice WAITE, in the same case, in giving the opinion of the court, says:

"The act is not one to prohibit all contributions of money or property by the designated officers and employes of the United States for political purposes. Neither does it prohibit them altogether from receiving or soliciting money or property for such purposes. It

POOR COPY

simply forbids them receiving from or giving to each other. Beyond this no restrictions are placed on any of their political privileges."

After considering various acts of Congress, the learned jurist proceeds as follows:

"The evident purpose of Congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the just scope of legislative power, and it is not easy to see why the act now under consideration does not come fairly within the legitimate means to such an end. It is true, as is claimed by the counsel for the petitioner, political assessments upon office holders are not prohibited. The managers of political campaigns not in the employ of the United States are just as free now to call on those in office for money to be used for political purposes as ever they were, and those in office can contribute as liberally as they please, provided their payments are not made to any of the prohibited officers or employes."

106 U. S., pages 372, 373.

Had the twenty first and twenty-second sections of the Illinois Civil Service Act been under consideration, or an act of Congress containing like restrictions, it is very plain that the reasons so clearly and so forcibly expressed by Mr. Justice Bradley would have produced from this court an unanimous opinion, stamping its seal of condemnation upon so flagrant a violation of the rights of the citizen. Then, too, Congress was not nor is it now restricted in its action by the Fourteenth Amendment, upon which we here rely. We, therefore, urge this case, *ex parte Curtis*, 106 U. S., 371, as directly in point and as fully and completely supporting our position that the said Civil Service Act of Illinois denies the freedom of political

BLEED THROUGH

action, making it highly penal for the citizen as well as the office holder to take part in party politics by giving or receiving contributions, etc., as prescribed and set forth in Sections 21, 22, 23 and 24 thereof.

VI.

The said act of March 20, 1895, provides for the creation and maintenance of an office-holding class, at the expense of the people who are excluded therefrom, by the operation of the said act.

In the speech of Senator Carpenter, of Wisconsin, in resisting the report of a committee in regard to the Civil Service Act of Congress, that eminent constitutional lawyer said:

"Mr. President, in politics 'words are things.' 'Civil Service Reform' is a cunning catch word. Whoever is not in favor of reform must be in favor of abuses. This is the rapid logic by which some men hope to conceal their real purposes and commit us to ideas and theories which belong to monarchial governments. But change is not necessarily reform.

* * * * *

The great principle upon which our governments rests, the philosophy which supports all free institutions, is that the powers of sovereignty should be so distributed among different officers and bodies that each department shall operate as a check upon the others, and the concurrence of all be indispensable to the government's proceeding at all.

* * * * *

The fundamental philosophy of the report of the board is that the civil officers of the government should be held during good behavior and this in my opinion is a radical error. The report (page 3) commends as wisest and most reasonable the policy of removal only for cause. And on page 5 the committee contrasts the

POOR COPY

civil service unfavorably with the military and naval services and adds: 'there are modest, honest, and able citizens enough who would gladly serve the country for a moderate and permanent salary,' etc.

This leading idea of the report is altogether anti-republican and unconstitutional. This subject was much discussed when the constitution was adopted. Those who favored a strong government, and were most disposed to build upon the model of the British monarchy, desired a more permanent tenure of civil office; but their views found little encouragement and it was finally determined that none but the Judges should hold by such tenure. This exception in the case of the Judges was made for the reason that it was believed that they ought to be independent of popular control and placed beyond popular reach. This exception rests upon a reasonable foundation? Whether A or B is entitled to a particular estate depends upon legal principles and ought not to be effaced by a popular sentiment upon the subject. And unless the constitution in regard to the judicial department rests upon an erroneous theory it must follow that just in proportion as you make the other officers permanent incumbents you remove the government from the reach and control of the people. Every rule and regulation devised by this board looks to the accomplishment of this end and tends to carry into effect a principle which was purposely and carefully excluded from the constitution and has always been condemned by the American people.

Another leading idea of the report is that party is the bane of republican government; that to labor to secure the ascendancy of a party ought to fix upon a man a brand that should exclude him from public office. And the design of this system is to place all the officers within its operation beyond the reach of the people and to remove from them all anxiety in regard to the triumph or overthrow of any political party. The army and navy are officered upon this principle because their duties require scientific knowledge and long experience for their proper performance. For this reason the government furnishes education to a sufficient number of persons to officer these branches of the public service.

BLEED THROUGH

But with civil officers the case is wholly different. In the frequent changes which take place in the heads of departments and in all subordinate offices no great public inconveniences have been experienced. The duties of civil officers are regulated by law; and any intelligent man may shortly acquaint himself with the duties of any civil office. But the law can not prescribe how a ship should be managed in a storm; how an army should handled in the face of an opposing force; how a fort can be carried by assault or a fortified place reduced by siege. The necessities of the case have induced an exception in this particular from the republican theory that a government for the people must be a government by the people, a government whose officers may be compelled to execute the public will by being constantly within popular reach."

Cong. Globe, Part 1, 2d Sess. 42d Congress, 1871–72, page 453.

Anglomania is chargeable with many of the evils of legislation with which we have to contend. The constant desire to introduce into our free institutions features of the British government, which to some seem admirable, lead them to the advocacy of radical changes in our system without consideration of the fact that by making such changes we are but adopting the very thing which was rejected by the fathers of the republic, and was one of the main causes for the separation in 1776. Among these features is life tenure for the public offices.

That this is the legitimate result of Civil Service laws can not well be denied. It may be that the General Assembly of the State of Illinois may make the offices and places of employment in any or in all of the cities of that state, subject to incumbents respectively with life tenure. Perhaps we may not be permitted to object to this under any existing constitutional provision of that state. It may be

POOR COPY

true that the General Assembly there is unlimited and unrestricted in this respect, but what we do strenuously object to is the means and machinery which this act under consideration furnishes with which to fill such offices and places to begin with and with which to provide for the removal of such incumbents and for the filling of vacancies because:

First. The act as a whole was made exclusively for the "Place hunters" (per Magruder, J., Rec., 101), for the "office seekers," for the "applicants."

(Per Mr. Justice Peckham as quoted, Rec., 101.)

We do not seriously object to the examination of candidates for office which shall be public and free to all citizens of the United States, but we most seriously and most emphatically object to the limitations of the provisions of this act:

First. As to classification.

Second. To applicants for the positions to which they severally seek to be appointed.

Third. To the requirement which prescribes that the appointing officer "shall fill such place by the ap-"pointment of the person certified to him by said com-"mission therefor."

Fourth. We object entirely to the competitive feature of the act. Instead of the open, generous and free competition in the political field, this act introduces competetion of an unknown and uncertain kind or kinds as to capacity under the ever changing and changeable rules of an irresponsible public employment agency denominated the Civil Service Commission. The act shuts out and precludes legitimate and necessary political action. It inaugurates the absolute necessity for a con-

BLEED THROUGH

tinual strife for office by applicants, by place hunters, by office seekers, rewarding the successful competitor with the position which he seeks to occupy. The merit and fitness thus provided is confined exclusively to those individuals who conceive the idea that he or she wants public office or employment, usually to those whose convenience or necessity prompt him or her to make the requisite application for the same.

The creation of a class; the prohibition of any appointment to or employment in the public service of a city like Chicago outside of said class is destructive of the two great rights, privileges and immunities of every citizen, namely liberty and equality. The act thus silences the voice of the people and thwarts their will as expressed at the polls. Deny to the Mayor of the city the right to make any selection whatever in any office of consequence under his administration and do you not abridge the civil and political rights which appertain to such office? His official tenure has been fixed for two years; so too the official tenure of the Alderman and the most of the heads of departments and their subordinates. Usually in the election of a Mayor of the city measures which during his administration he should pursue, have been indicated by the popular will. Prevent him from bringing in to his aid those whose political tenets are in accord with such measures and you resist if you do not destroy such will. And right here we insist that this act is seriously at fault for it prescribes that:

"No questions in any examination shall relate to political or religious opinions or affiliations."

Is not this exactly where political tenets should be inquired into? If in the election of the chief magistrate of the nation, the people have used and manifested their

POOR COPY

approval of certain political tenets or proposed measures by a majority vote at the polls, why may not, why should not such tenets be required of any or all who are appointed or selected to fill the several subordinate civil offices and places of public employment?

VII.

And generally said act of March 20, 1895, is directly in contravention of the right of that clause of the United States Constitution, which prescribes that:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the laws."

Every citizen is heartily in favor of securing efficiency in the public service and will favor legislation calculated to bring about that result. The enthusiasm, however, of many well meaning men, if not confined within proper constitutional and legislative channels, may unfortunately overwhelm and sweep away guarantees obtained by many years of popular struggle, the foundation upon which the American commonwealth has securely rested for more than a century. The Civil Service Law of the United States provides a method of selection by examination, but permits the heads of departments to decide as to the competency of the men selected, and to discharge them whenever it shall appear to such heads to be wise to do so. The Civil Service Laws of Massachusetts and of New York are of a somewhat similar charac-

BLEED THROUGH

ter in that regard. The Civil Service enactment, however of the State of Illinois goes farther than either of the three. In addition to delegating the entire power of selecting men for official positions to a commission, no member of which is in any way concerned in or familiar with the work necessary to be performed for the municipality, it confers upon this commission the power of passing upon the qualifications of all men who desire to serve the public by accepting official positions, while it prohibits officers elected by the people or placed in charge of the several departments of the city government from selecting or attempting in any way to pass upon the qualications of, any of those whom they are obliged to employ, and upon whose work their own success or failure as administrative officers largely depends; it absolutely prevents the exercise of any discretion upon the part of the heads of any department in retaining or discharging persons once selected and certified to them by the Civil Service Commission, excepting as a trial of the question of the competency of the employe is held before the commission, and after the lack of qualification shall have been demonstated to the satisfaction of that body and an order of discharge by such commission shall have been entered and enforced. There are but two classes of employes excepted from these conditions. No discretion is permitted by the statute; the heads of departments must accept those certified to them by an outside tribunal, notwithstanding that they know that some whom they are obliged to accept are entirely unfit for the positions to which they have been assigned and though they may be dishonest and untrustworthy and not in harmony with the views of those under whose direction they are re-

POOR COPY

spectively placed. The law provides that the 10,000 employes of the City of Chicago in the event of a change of administration antagonistic to the newly elected officer selected by the people to direct the affairs of the municipality, many of whom may be tainted with dishonest methods which the newly elected officers were chosen for the purpose of reforming, may each demand a trial before the Civil Service Commission, and although the commission may exercise the greatest diligence and may devote their entire time for two years to the purpose, dedicating six hundred days to that work, the term for which the officers were elected, will have come to a close without a possibility being afforded for the investigation and disposition of to exceed six hundred cases. The ten thousand employes will know at the commencement of an administration that they can not be discharged except in the two instances referred to. Their tenure is for life. The heads of departments have absolutely no control over them. True, there is an opportunity to suspend for thirty days, but this is the only remedy afforded the officer to whom is intrusted the conduct of the city's business. The affairs of a great city can not be administered under such a system. Those who advocate the maintenance of a method of this character have had little or no experience with the actual operation. There is not a merchant on earth, there is not a corporation or business house in existence, which could carry on its business in the manner prescribed by this act without in three years' time becoming bankrupt. Where is the merchant who would be willing to delegate to the proprietor of an intelligence office the sole power to determine and pass upon the qualifications of his employes, not only at the time they were selected, but at

BLEED THROUGH

the time he might desire to discharge them, and in case such proprietor thought the employe incompetent, might require his retention. What great business house or corporation could stand any length of time if its employes knew that before they could be discharged it would be necessary for their employer to prove to the satisfaction of an outside tribunal and by preponderance of the evidence that they were not qualified to transact the business for which they were appointed, particularly if they knew that with the utmost expedition their employer could at most remove unsatisfactory employes at a rate of speed not greater than one each day. No system ever was or ever will be devised which is better calculated than this to impede the transaction of public business, and to paralyze the efforts of administrative officers. The advocates of the law in their earnest desire to avoid some of the disadvantages attending the old system have proposed methods which are infinitely worse. It is not difficulty to see what must be the result of an attempt to enforce such a system in the offices respectively of the City Comptroller, Collector, Clerk, Treasurer and Superintendent of the Water and Meter Departments. In these offices the employes are called upon to receive or disburse daily not hundreds alone but thousands of dollars. To fill these places the commission has held examinations, and has tested the ability of many applicants. Those who succeeded in the examination were able to read, spell, write and cipher with a reasonable degree of skill, but no test general in its application was made, nor do I understand how it is possible for one to be made, of the fidelity and honesty of the applicants for positions. Without these two qualifications an employe would be

POOR COPY

worthless. What might be naturally expected, I am informed, did really occur as the result of that examination. The man at the head of the list, the one appointed to a position where at times not less than $200,000 a day would pass through his hands, was one whose habits were so extremely unfortunate that no man who knew him would think of entrusting to him $10. but against the protest of one of the heads of that department, and the protest of the sureties upon his official bond, the commission did not dare certify. Is it not more reasonable that the one who has undertaken the administration of the affairs of a public office, who is a man of financial and business standing, who has given bonds for the faithful discharge of his duty in some instances aggregating millions of dollars, would be better able to select his assistants than the tribunal knowing nothing of the conduct of the office, knowing none of the applicants for positions excepting as they appear in the examination room during one of two days, and that can of necessity feel none of the responsibilities for the safe keeping and the disbursement of the millions of dollars thus placed in public trust.

An examination was held for the position of police captain. Those who succeeded in spelling twenty words correctly, in solving six arithmetical problems, in copying accurately, in writing a letter, and in displaying in some other way certain mental qualities, and in passing an examination as to their physical condition, were placed at the head of the list. It is true that the length of service in this examination entitled the applicant for position to certain credits, but the main qualifications, those of courage, readiness in emergency, quickness in danger, tact, clearness and acuteness of mental vision,

BLEED THROUGH

were not considered, nor do I know how it would have been possible for the members of the commission to whom these applicants were unknown to have made any satisfactory test as to these qualifications. It is true that there is a probationary period of six months after the applicant has been certified to determine his qualifications, but during this time even the probationer may not be discharged except upon a trial before the commission, so that the selection under this law of the fifteen police captains for the City of Chicago depend upon the ability of the gentlemen selected, to spell, write and cipher.

The applicants for positions are so numerous that in the tests which are made the ability of the applicant in orthography although not gaining a very high percentage is nevertheless sufficient to determine whether he shall become one of the fifteen police captains upon whose ability depends the lives of the citizens and the safety of their property interests. I do not know how the commission could possibly have examined in any other way, and I do not seek to criticise adversely their efforts in that direction. I believe that they have done as well as it was possible for any men similarly situated to do. They are unfortunately limited by unfavorable conditions. It is well known that among the applicants were many men who for years had been members of the police department of Chicago, but are not now members of the force. Some of them who were on the force at the time of the Haymarket riot and had taken part in that affair and possessed experience and ability; although these men were capable of at once stepping in to the position of police captains and performing the duties of that office satisfactorily, yet they were unable, in con-

POOR COPY

sequence of the limitations of the Civil Service Law, to enter for any examination excepting for that of patrolman; in case of their success they will each be obliged to spend each a year as patrolman before being permitted to take any examination for the position of sergeant, and then another year must be spent before they will be admitted to take the examination of lieutenant, and still another year before they are allowed to show their capacity in spelling and in ciphering and passing the examination for police captain. It is worthy of note that an officer of great efficiency who succeeded after a magnificent exhibition of courage, alertness and capacity in his line of work, in discovering and in bringing to justice eight thieves, could not be promoted by the Chief of Police who desired to promote him for his efficiency and for the effect that it would have upon the other men in the service, on account of the limitations of the Civil Service Law. It will be necessary for this man to wait his year and then be tested in arithmetic and spelling before he can be advanced to the next highest grade so that he may draw the salary which is attached to that position. He was advanced to the next position, but he is a patrolman only acting as sergeant and receiving a patrolman's pay. The law which renders the police force of Chicago subject to conditions of this character, which imposes these ridiculous restrictions is not in the interest of good government and is positively dangerous to the citizens of a great municipality. I refer from practical knowledge of the workings of this law, to actual conditions instead of and in answer to the theories elaborated in the opinion in this record.

It is neither possible nor desirable that those holding

BLEED THROUGH

office should be free from political thoughts and even prejudices, but it is essential to the proper conduct of municipal business that those entrusted with the execution of the details of municipal work should be in entire harmony with the one who directs. In this line of thought I desire to submit an extract from a letter written by George Washington, the first President of the United States, with reference to an applicant whom he declined to appoint because he was not politically in accord and sympathy with the national administration of that day. He says:

"I shall not whilst I have the honor to administer the government bring a man into any office of consequence knowingly whose political tenets are adverse to the measures which the general government are pursuing, for this in my opinion would be a sort of political suicide. That it would embarrass its movements is most certain."

What would have been the condition of the United States during the years of the Civil War if President Lincoln had been subject to the limitations of such a law as this enactment in his appointments to office? At the time of his first inauguration almost every office in the country was occupied by one not at all in sympathy with the ideas of the incoming administration. Most of those in the public service were not only in harmony with but were absolutely hostile to the administration of governmental affairs during the period of the ensuing four years. Would the affairs of the country have been more wisely, safely, economically or satisfactorily conducted had President Lincoln been obliged by some such enactment as this to have delegated the selection of men in the Civil Service and volunteer service of the

POOR COPY

United States to an outside tribunal, accepted men for position not on account of their fidelity to their employers or loyalty to the Union or their honesty, not on account of their courage and endurance, but because they happened to hold a certificate stating that in an examination they had satisfactorily solved some arithmetical problem, and were able to read, write and spell twenty words correctly. Would the services of such men have given any higher satisfaction than those who were chosen under the old method? What would have been the result if the one hundred and fifty or two hundred thousand employes in the Civil Service of the United States when dismissed from office had demanded a trial and the privilege of showing their fidelity to the Union cause, their willingness to assist the administration, to put down rebellion and their competency to fill the positions which they had been holding? The trials would have been going on to this day however vigorously a Civil Service Commission appointed to conduct the trials might have acted. The efforts of the administration would have been retarded and obstructed and the government would have been crippled. It would have been impossible to have conducted the business required to be performed during the four years of the Civil War with persons in office who were hostile to the administration, and yet a law similar to this Civil Service enactment if adhered to would have obliged the heads of departments to continue in the transaction of public business with hostile men. For nearly one hundred years the system of allowing officers chosen by the people to make the selection of their assistants has been in vogue, and it is the only possible basis upon which a free government

BLEED THROUGH

can exist. The New York law, which as I understand it, allows examinations, but permits the official responsible to the people to make his selection of all those whose names appear on the eligible list, and does not oblige him to take the first upon the list, is in this respect unobjectionable. That law also permits the discharge at any time of employes without a trial. Any other system must of necessity not only be unsatisfactory, but obstructive to the proper transaction of public affairs. It may be possible for the one municipality in Illinois, which is affected by this law, to endure it in case the law is held to be valid, but as certain as is the sun to rise to-morrow the people of that city will be obliged to and will in the near future demand such changes as will enable the city to transact its affairs.

I would not claim that the old methods could not be improved upon, but it may be truthfully said that during our entire history the greatest of political crises have been successfully met by officers chosen by the people assisted by men whom they have selected. It is true incompetent men have at time crept into office; and Civil Service enactment is no guaranty that the men selected for public position will always be found competent. On the contrary, so far as practice or even theory can discern, the number of men found incompetent under the Civil Service Law is comparatively greater than under the old system. I believe that a law could be framed permitting the Mayor and his chiefs to make selection from the eligible lists, admission to which should be by examination so far as many officers in the public service are concerned. Many appointments, however, are not susceptible of that kind of treatment, and any attempt to bring about a change of appointment for po-

POOR COPY

sition, such as captains of police, positions in in the offices of the City Treasurer, City Comptroller, City Clerk and City Collector will simply retard instead of aiding the transaction of public business. This enactment, proposed doubtless by well-meaning men, has had its first test since last April. Prior to that time, with few exceptions, all of the employes of the city government were appointed under the old system. It has only been, therefore, within the past few months that the law has been tried and its objectionable and obstructive features discerned. The effort of its framers seems to have been to make a law which in its effect would mold every employ into a machine incapable of holding political opinions and practically of taking any part in elections, and one of the chief objections to the Civil Service Act is found in Section 21, by the terms of which every employe is made a political eunuch incapable of advancing the interest of his country and deprived of the privilege of participating in political action. The section reads as follows:

"No officer or employe of such city shall solicit, orally or by letter, or receive or pay, or be in any manner concerned in soliciting, receiving or paying any assessment, subscription or contribution for any party or political purpose whatever."

In effect, the employe by that section is robbed of his political privileges, is deprived of the freedom of political action, is not permitted to take part with political clubs or political parties unless upon his entrance into his club or party he makes it a condition precedent that he shall not pay any money for the dissemination of political literature, hall rent or many of the other legitimate expenses incident to political action, and he is obliged to adopt this course under penalty as declared in

BLEED THROUG

the Civil Service Act of fine and imprisonment. Section 21 deprives him of one of the greatest privileges that can be accorded American citizenship—that of participation in public affairs. In effect it tells the employe that he may join a political club or party if he desires, but he must not pay any of its expenses. He must not write or circulate political pamphlets or assist in their circulation if it involves any expenditure of money unless others are willing to contribute. It deprives him of the opportunity of attending a political club unless he can find some one to pay his share of its expenses. A limitation of this kind upon the rights of an American citizen simply because he elects to serve the public is unquestionably in contravention of rights which are preserved to every citizen of this state by Section 1, Art. 2 of the Constitution of 1870, which declares, "That all men are by nature free and independent, and have certain inherent and inalienable "rights, among these are life, liberty and the pursuit of "happiness." There can be no question either that it is in direct opposition to rights secured by the Fourteenth Article of the amendment to the Constitution of the United States, wherein it is declared that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. By virtue of Section 21 citizens of Cairo and Alton and other municipalities within the State of Illinois may exercise the highest privilege of an American citizen, take part in any political action undisturbed by fear of the infliction of fine and imprisonment whether he holds pub-

POOR COPY

lic office or does not, but in the City of Chicago the man who holds office must do so with the understanding that he shall make no contribution for any political purpose, and must of necessity not join in any club or organization unless he stipulates in advance that other persons shall pay his share of the expense.

It is hardly necessary to say that:

"In constitutional law, liberty is something more than mere freedom from physical restraint. * * * It means freedom to go where one may choose, and to act in such manner, not inconsistent with equal rights of others, as his judgment may dictate, for the promotion of his happiness; that is to pursue such callings and avocations as may be most suitable to develop his capacities and to give them their highest enjoyment."

FIELD and STRONG, JJ., in *Munn* v. *Illinois*, 84 U. S., 142.

The same court in *Butcher's Union Co.* v. *Crescent City Co.*, 111 U. S., 758, defines Civil Service liberty as existing "only where every individual has the power "to pursue his own happiness according to his own views "unrestricted except by equal, just and impartial law."

The civil rights guarantied by the Constitution can not be made to depend upon the business in which one is engaged. This was the ground upon which it was held in *Kuhn* v. *Common Council of Detroit*, that an act requiring an affidavit that neither surety upon certain bonds was engaged in the sale of certain liquors was in violation of the State Constitution providing "that no "person shall be deprived of life, liberty or property "without due process of law," and the Fourteenth Amendment to the Constitution of the United States, and void, the right to sell liquor in that state being lawful.

Kuhn v. *Common Council of Detroit*, 14 West. Rep., 478.

The right of office is a constitutional right. "Eligibility to public trusts is claimed as a constitutional right which can not be abridged or impaired. The constitution establishes and defines the right of suffrage and gives to the electors and to various authorities the power to confer public trusts. It declares the ministers of religion shall be ineligible to any office; it prescribes in respect to certain offices particular circumstances, without which a person is not eligible to those stations; and it provides that persons holding certain offices shall hold no other public trust. Except in particular exclusions, thus established, the electors and the appointing authorities are by the constitution wholly free to confer public stations upon any person according to their pleasure. The Constitution giving the right of election and the right of appointment, these rights consisting essentially in the freedom of choice, and the Constitution also declaring that certain persons are not eligible to office, it follows from these powers and provisions that all other persons are eligible. *Eligibility in office is not declared as a right or principle by any express terms of the Constitution, but it results as a just deduction from the express powers and provisions of the system.* The basis of the principle is the absolute liberty of the electors and the appointing authorities to choose and to appoint any person who is not made ineligible by the Constitution. Eligibility to office, therefore, belongs not exclusively to electors enjoying the right of suffrage. It belongs equally to all persons whomsoever not excluded by the Constitution. I therefore conceive it to be entirely clear that the legislature can not establish arbitrary exclusions from office, or any general regulation requiring qualifications which the Constitution has not required." (*Baker* v. *The People*, 3 Cowen, N. Y., 322; 15 Am. Dec., 1824.)

And pertinent to this idea of the right of the citizen to be governed by laws uniform in their operation it might be well to avert to the position taken by the learned Judge Magruder, in that part of his opinion relating to the right of the Common Council of the City of

Chicago under the act relating to the incorporation of cities and villages to enact the ordinance which renders necessary the appointment of captains of police by the Mayor and their confirmation by the City Council. He holds that the Civil Service Law prevents the City Council of Chicago from taking such action, although up to the time of the enactment of the Civil Service Law there was no limitation upon its right to enact such an ordinance. The right never was and never could be questioned, nor can the right of any other city in the state to pass such an ordinance in the government of their own affairs be questioned until they shall have adopted this Civil Service Law, but it is held that the latter law prohibits in Chicago further legislation of that character.

The Civil Service Act is plainly in violation of Section 5, Article 2 of the Constitution and also of Section 9. Section 5 declares that "the right of the trial by "jury as heretofore enjoyed, shall remain inviolate." Section 9, that in all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. Section 12 of the Civil Service Act provides that charges shall be investigated by or before said Civil Service Commission, or by or before some officer or board appointed by said commission, to conduct such investigation; that the finding and decision of such Commission or investigating officer or board, when approved by said Commission, shall be certified to the appointing officer and shall be forthwith enforced by such officer. Section 14 that:

"The Commission shall investigate the enforcement

BLEED THROUGH

of this act and of its rules, and the action of the examiners therein provided for, and the conduct and action of the appointees in the classified service in its city. In the course of such investigations each Commissioner shall have power to administer oaths, and said commission shall have power to secure by it subpœna both the attendance and testimony of witnesses and the production of both books and papers relevant to such investigation."

Section 33 provides that any person who shall be served with a subpœna to appear and testify and who shall neglect to do so, shall, on conviction, be punished by fine of not less than $50 and not exceeding $1,000, or by imprisonment in the county jail for a term not exceeding six months, or both fine and imprisonment in the discretion of the court. By Section 33 any Circuit Judge throughout the state may, upon application of any one of the commissioners or any officer of the board, in his discretion, compel the attendance of witnesses and giving of testimony by attachment for contempt or otherwise, in the same manner as the production of evidence may be compelled before said board. The act, therefore, not only denies the right of trial by jury, giving the commission full and explicit power as a court to try and deprive the appointee of what has been made by the Civil Service Act a vested and property right, but it also gives authority to any Judge in the entire state to entertain a proceeding for contempt upon the application of any member of the commission, or any of its officers not only within but outside of the district in which the respondent may reside.

I am aware that in the case of *Donahue* v. *County of Will*, reported in 100 Ill., page 94, it has been held that

POOR COPY

a public office was not a property interest, but at the time of that decision the Civil Service Law had not been passed. Under this recent act, however, if the act can be maintained, an office in the classified service is a valuable privilege, is equivalent to a property interest for its tenure is during life of the occupant on condition merely that he is competent to transact its business. It is such a privilege and immunity as is protected not only by the Constitution of this state but that of the United States; but the Civil Service Act proposes to permit a commission to take away that valuable franchise without a hearing before a proper legal tribunal. The kind of trial and judgment by the commission provided by the Civil Service Act which gives the commission power to try any infraction of its rules, a violation of which is made a criminal offense is clearly in violation of the requirement that it should be before an impartial jury.

We would call the court's attention particularly to the distinction between the power of appointment to office, and the power to remove from office. The former, the power to appoint to public office by whomsoever exercised has been declared to be intrinsically executive. (See cases cited 19th American English Enc. of Law, pages 418, 419.)

The power to remove from office for cause requires the exercise of judicial power, in determining the cause, and whereas in this case, the power to determine the cause is conferred upon another than the appointing power under our constitution, it being an exercise of judicial power and not of discretion should have been conferred upon some judicial tribunal.

Acts or omissions upon the part of an incumbent which forfeit the right to an office do not forthwith render it

BLEED THROUGH

vacant, and it becomes so only by the judgment of the court of competent jurisdiction, instituted for the purpose of removal of the officer.

Proceedings for the removal of an officer for cause are judicial in their nature and must be had before tribunals clothed with judicial powers. This doctrine is very fully discussed in the following cases:

Page v. *Hardin*, 8 B. Mon. (Ky.), 672.
Andrews v. *King*, 77 Me., 224.
Dullam v. *Wilson*, 53 Mich., 392; 51 Am. Rep., 128.
Charles v. *Mayor, etc. of Hoboken*, 27 N. Y. L., 203.
State v. *Pritchard*, 36 N. Y. L., 101.
In re Cleveland, 51 N. J. L., 311.
In re Nichols, 6 Abb. N. Cas. (N. Y.), 474.
57 How. Pr. (N. Y.), 395.
State v. *Prince*, 45 Wis., 610.

The cause of *Donahue* v. *Will County*, 100 Ill., 94, where it was held that a statute authorizing a County Board to remove a County Treasurer for nonfeasance or malfeasance does not contravene the constitutional provision vesting all judicial power in the courts is valid, we insist has no application to the case at bar. For we insist here that for the reason that the Legislature has created a tribunal outside of and beyond the appointing power and clothed it with the power to determine after a trial or hearing between the interested parties. That tribunal considers the law and the facts. It is a judicial inquiry—a cause in each case of complaint or charge has to be made; this requires not only allegation but proof; the law of plead-

POOR COPY

ing the rules of evidence, and all the principles of jurisprudence applicable to the exercise of judicial power become involved. In the Will County case it was apparent at the outset that the Treasurer was a defaulter. No judicial inquiry was necessary. The fact was self-evident to the county authorities. They had before them the delinquency of the Treasurer. They had caught him in the act. They had the power of a motion hence they had a right by a summary proceeding to discharge him for what was self-evident. It is true that the learned Judge who gives the opinion in that case, prompted undoubtedly as the court was urged to, regarded the case or the facts in the case as raising in its broad sense the constitutional questions that are really involved in the present controversy. We, therefore, urge it as an independent proposition that the proceeding for the removal of an officer for cause where an inquiry is necessary to determine that fact where charges are to be preferred and a defense may be interposed where a trial may be had, where a judgment must be rendered and that judgment may be one of acquittal or deprivation of the office, the proceeding should be had in view of the Federal Constitution only before tribunals clothed with judicial power. We would commend to the attention of this court the case of *Dullam* v. *Wilson*, *supra*, and *Charles* v. *Mayor of Hoboken*, 36 N. J. L., 101; *In re Cleveland*, 51 N. J. L., 311. This proposition we believe to be so plain and indisputable that it is conclusive as to the unconstitutionality of the Civil Service Law.

The very theory of the act, is to create permanency of tenure in office and added efficiency. That the government is entitled to retain its employes in office, that it may get the benefit of the increasing knowledge and

BLEED THROUGH

facility in service which comes from continuance in office; and that the tenure being *secure*, during good behavior, capable and trustworthy men, will seek the office, having assurance of retention; and that the appointments and discharges shall not be made according to the whim and caprice of the appointing power. The law thus was intended to create a property in the office and the theory, if carried out, ought to remove the danger of discharge arising from the prejudiced action of a commission assuming unlawfully to exercise all the functions of a judicial tribunal. But such is not the Civil Service Act now under consideration.

That an office is a property right has been declared by a number of courts. One case is that of *Wammack* v. *Holloway*, reported in the 2d of Alabama, at p. 33. The court says:

"An office is as much a species of property as anything which is capable of being held or owned; and to deprive one of, or unjustly withhold it, is an injury which the law can redress, in a manner as ample as it can any other wrong. (2 Black. Com., 263; 2 *Ib.*, 36, 4 Bac. Ab. Office G., 297.) An office being a species of property, it is evident that conflicting claims to the right to hold it must be decided in the same constitutional manner, as well as all other claims respecting property. It is certainly true, that the old writ of assize of office, has long since fallen into disuse, by the introduction of a more convenient remedy, by information in the nature of a *quo warranto*, in which proceeding, the franchise is usurped, is seized by the state, and then conferred on the rightful claimant. The redress is not the less efficient, because the suit is conducted in the name of the state."

The tenth section of the bill of rights provides that no one shall be deprived of his life, liberty or property, but by due course of law; and the twenty-eighth section or-

POOR COPY

dains that the right of trial by jury shall remain inviolate. It is apparent, if the latter section was omitted, then there would be no constitutional prohibition of laws by which one might be deprived of life, liberty or property, if under the constitution, such a court was so constituted as to consist of one or more judges; but with that section, as it stands incorporated in our fundamental law, no citizen or the state can be deprived or debarred from the right of trial by jury in all cases when it is allowed by the common law.

We need not cite authorities to prove that by the common law, no one can be deprived of the right to exercise or hold a civil office, but by the judgment of his peers, as we have already shown, that an office is a species of property.

The same principle was recognized in the case of *Hoke* v. *Henderson*, reported in the 15th of North Carolina, at page 17. The court declared as follows:

"The sole inquiry that remains, whether the office of which the act deprived Mr. Henderson, is property. It is scarcely possible to make the proposition clearer to a plain mind, accustomed to regard things according to practical results and realities, than by barely stating it. For what is *property;* that is, what do we understand by the term? It means, in reference to the thing, whatever a person can possess and enjoy by right; and in reference to the person, he who has that right to the exclusion of others, is said to have the property. That an office is the subject of property thus explained, is well understood by every one, as well as distinctly stated in the law books from the earliest times. An office is enumerated by commentators on the law among *incorporeal hereditaments;* and is defined to be the right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging. (2 Bl. Com., 36.) A public office has been well described to be this: When one man is specially set by law, and is compella-

BLEED THROUGH

ble to do another's business against his will and without his leave, and can demand therefor such compensation, by way of salary or fees, as by law is assigned; to the doing of which business no other person but the officer, or one deputed by him, is legally competent. (Carth., 478; Leigh's Cas., 1 Mumf. Rep., 475.) That the purpose of creating public offices is the common good is not doubted. Hence most of the rules regulating them have a reference to the discharge of the duties, and the promotion of public convenience; they are *pro commodo populi*. Hence they are not the subjects of property in the sense of that full and absolute dominion which is recognized in many other things. They are only the subjects of property, so far as they can be so in safety to the general interest, involved in the discharge of their duties. This principle demands that different rights of property should be recognized in different offices. It is one of the ordinary rights of property to alien and dispose of it at pleasure; but that is inadmissible in public offices, because the public require a responsible person to answer for defaults. Besides, the power of alienation is not the test of property; for doubtless it is within the scope of legislative authority to restrict it or deny it—as in the laws which prescribe the ceremonies necessary to the validity of wills, or conveyances of infants and married women, and which deny altogether the power of conveying, and which interdict all conveyance made *in mortmain*. It is another ordinary right of property to have the power of substituting another person to manage it, or to let it lie idle and unmanaged. But the former is not allowable in some offices, and the latter in none. The chief executive office and judicial offices can not be delegated, while subordinate ministerial ones may. For there would be no security that, in the former cases, the delegate would be competent, and no responsibility of the superior would be adequate to answer the consequences. Though in the latter it is otherwise. But *non user* is punishable in all public offices, and at the election of the public is a forfeiture. So a misdemeanor or corruption in office may be punished by judicial sentence in any manner prescribed by law, including a motion as for a forfeiture.

POOR COPY

These are all restrictions and penalties to secure the public service, which is the object in creating the office. But with these limitations and the like, a public office is the subject of property, as every other thing, corporeal or incorporeal, from which men can make a livelihood and make gain. The office is created for public purposes; but it is conferred on a particular man and accepted by him as a source of individual emolument. To the extent of that emolument it is private property, as much as the land which he tills, or the horse he rides, or the debt which is owing to him. Between him and another man, none will deny the right of property. For if one usurp an office which belongs to another, the owner may have an action for damages for the expulsion, for the fees of office received, and a remedy by *quo warranto* to inquire into the right of the usurper, and by *mandamus* to be himself restored. When we find these remedies established to enforce the right of admission into office, to secure the possession of it and its emoluments, we cannot no longer doubt that in law an office is deemed the subject of property and valuable property to the officer, as well as an institution for the convenience of the people. If it be so, it falls within these provisions of the constitution which secure private interests."

The Civil Service Law unlawfully delegates legislative functions to the commissioners. Article 4, Section 1 of the State Constitution provides that "the legislative power shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both to be elected by the people." This legislative power can not be delegated, but the Civil Service Act gives power to the commission to pass such rules as they may see fit respecting applications to public office, and the qualifications, conduct, retention and discharge of those who make application therefor. Indeed, power is given to the commission beyond that which is delegated to the legislature itself. The Commission of Chicago may frame

one set of rules having the force of laws while in another part of the state another city may enact legislation of an opposite character. The Commission in Chicago may enact a law that no one above the age of 35 years shall be admitted to the public service. The Commission in Cairo, if one be established, may enact that no one shall be admitted to the public service under the age of 35. There is apparently no limit in the power which is conveyed to the commission by this act as to the character, quantity or quality of the laws which it may enunciate. This law provides for special *legislation*—a different operation of the law in different localities, or indeed, a different law, in different localities.

It is not an answer to respond that this may not be so, and that it may be presumed that the Commissions in the different cities will adopt different rules. Whatever may have been the intent of the Legislature they are not obliged by the law to do so. The character, and the constitutionality of the law is to be determined, not by what may be believed to have been, or was, the interest of the lawmakers, but by what is the necessary operation of the law.

Brimmer v. *Rebman*, 138 U. S., 81.
Minnesota v. *Barber*, 136 U. S., 313, 319, and authorities cited.

At the inception of the government two principles were contended for, one, that which is embodied in the Civil Service Act, a life tenure of office, and the other, rotation in office, but the wisdom of the Commonwealth found in favor of the latter course, and for nearly one hundred years has consistently upheld that principle. As was argued one hundred years ago, so with equal force

may it be adverted to at the present time that the maintenance of the present Civil Service Law means the establishment of a privileged office-holding class by a tenure which cannot be disturbed, owing allegiance to no one, and intent only upon increasing the dignity or emoluments incident to the positions which the members of that class may hold. The Civil Service of the United States government numbers nearly two hundred thousand men. The Civil Service of the City of Chicago, if the contention of the petitioner in this case is upheld, will be not less than twelve thousand persons. If the theory is accepted that the act is beneficial, and it is extended to every city in the country, the number of those who will be gathered within its class can not be far less than a million persons. The Civil Service employes of the United States government have their Civil Service Association and organization for their own protection, advancement and assistance financially and otherwise. It is not difficult to have here with an army of nearly a million persons in the United States, armed not with the weapons of the Pretorian guards, but with the ballot, an organization just as powerful and one which would be able to dictate through the power which they themselves and their friends could exert the future policies of the United States. Advantageous as such a body would undoubtedly be in a monarchical government interested in sustaining its own life tenure and a life tenure for those in authority over them, yet the existence of such a body in this country working for its own advancement and with an inclination naturally to sustain measures that will help its members, would be a standing menace not only to the welfare but to the very integrity and existence of our form of government. The applica-

tion and extension of this law incompatible as it is with our form of government is, in my opinion, one of the most dangerous foes against which a republican form of government has to contend.

In addition, we also claim that Sections 12, 33, 34 and 35 of the Civil Service Act, and each of them, are null and void because they violate that provision of the Constitution of the State of Illinois, known as Article 2, Section 2, which requires that no person shall be deprived of life, liberty or property without due process of law, and because also it is in violation of the Fourteenth Amendment of the Federal Constitution, which forbids the enactment of laws of that character by the state. The said sections are also in conflict with Article 2, Section 5, of the Constitution of Illinois, guaranteeing to each citizen of this state the right to trial by jury, and of Article 2, Section 9, which guarantees to the accused in all criminal proceedings a speedy trial by an impartial jury in the county or district in which the offense is alleged to have been committed.

The act is also void in that it violates Section 22 of Article 4 of the Constitution of the State of Illinois, providing that the General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say, for incorporated cities, towns or villages, or changing or amending the charter of any town, city or village.

VIII.

And lastly, plaintiff in error avers that said Act of March 20, 1895, generally denominated the "Civil "Service Act," is absolutely null and void, because the same purports to require the civil officers of the City of Chicago to undergo tests as qualification for office and public employment in addition to the requirements of

Section 25 of Article 5 of said Constitution of the State of Illinois, not only in contravention thereof, but of the general principles of popular government, and because it provides for a political test for the said Commissioners respectively therein named, and because, further, the same is in contravention of Section 22 of Article 4 of said Constitution, as well as many other provisions of said state Constitution, and of the Constitution of the United States.

There are thirteen words in the Constitution of Illinois, which, if words have any meaning whatever, absolutely prohibit the tests for civil office which are prescribed by the Civil Service Act. They need never have been put in there. For the only test that can be applied must be in the Constitution itself. Having prescribed the oath of office as a test it was wholly unnecessary to declare further, viz.: "And no other oath, declaration or test shall "be required as a qualification."

Take away the Civil Service Act and all the citizens of Chicago are eligible to the offices and places in the classified Civil Service of the city. Make the classified service subject to the conditions and restrictions of the Civil Service Act and no one is longer eligible. All are made to start with, ineligible; this is the legitimate effect of the act; to become an eligible one must make application for being tested by examination under and pursuant to Civil Service rules.

And yet over the constitutional prohibition that "No "other oath, declaration or test shall be required" before anybody now can get even the menial position of scrub-woman in the City Hall, she must be subjected to competitive examination with all other applicants for the position. "Such examinations shall be practical in

BLEED THROUGH

"their character and shall relate to those matters which "will fairly test the relative capacity * * * and shall "include tests of physical qualifications and health "and when appropriate of manual skill." See § 6, p. 13, *supra*.

These are tests; they are *other* tests; hence they are inhibited by the state Constitution.

Oath of Civil Officers. All civil officers, except members of the General Assembly and such inferior officers as may be excepted, shall, before they enter on the duties of their respective offices take and subscribe the following oath or affirmation:

"I do solemnly swear (or affirm as the case may be) that I will support the Constitution of the United States and the Constitution of the State of Illinois and that I will faithfully discharge the duties of the office of according to the best of my ability."

And no other oath, declaration or test shall be required as a qualification. (Section 25 of Article V of the Const., of Ill.)

As well as by fundamental principles of popular government.

Attorney Gen. v. *Detroit Common Council*, 58 Mich., 223.

Although the constitution may not contain any limitation on the power of the Legislature in conferring the appointing power for municipal officers, yet it is a principle of republican government that such officers should be appointed by the local authorities.

Per GRAY, J. (*Rathbone* v. *Wirth*, 150 N. Y., p. 467.)

"The habit of local self-government is something we took over, or, rather, continued from the English system of government, and, as Judge COOLEY has remarked with reference to the constitution of the states: 'If not expressly recognized, it is still to be understood that all these instruments are framed with its present existence and anticipated continuance in view.' (Constitutional Limitations, 35) The principle is one which it takes but little reflection to convince the mind of being fundamental in our governmental system, and as contributing

POOR COPY

strength to the national life in its educational and formative effect upon the citizen. It means that in the local or political subdivisions of the state the people of the locality shall administer their own local affairs to the extent that that right is not restricted by some constitutional provision."

We therefore ask that the order and judgment of the Supreme Court of Illinois of December 22, 1897, be reversed and for such other order or direction as to this Honorable Court shall seem meet.

All which is respectfully submitted.

CHAS. S. THORNTON,
Attorney for Plaintiff in Error.

KIPLEY *v.* ILLINOIS.

KIPLEY *v.* ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Nos. 586, 601. Submitted March 14, 1898. — Decided April 18, 1898.

When the jurisdiction of this court is invoked for the protection, against the final judgment of the highest court of a State, of some title, right, privilege or immunity secured by the Constitution or laws of the United States, it must appear expressly or by necessary intendment, from the record, that such right, title, privilege or immunity was specially "set up or claimed" under such Constitution or laws; as the jurisdiction of this court cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up intended to assert a Federal right.

MOTION to dismiss. The case is stated in the opinion.

Mr. Edward C. Akin, attorney general of the State of Illinois, *Mr. George W. Smith*, *Mr. Frank P. Blair* and *Mr. Murry Nelson, Jr.*, for the motion.

Mr. Charles S. Thornton opposing.

MR. JUSTICE HARLAN delivered the opinion of the court.

The attorney general of Illinois filed in the Supreme Court of Illinois, at its June term 1897, an original petition against Joseph Kipley, superintendent of police of the city of Chicago, and Adolph Kraus, Dudley Winston and Hempstead Washburne, commissioners appointed under the act of the legislature of Illinois in force on and after March 20, 1895, entitled "An act to regulate the civil service of cities."

BLEED THROUGH

The application for leave to file the petition was accompanied by a suggestion upon the part of the attorney general that the case involved an interpretation of the above act.

The prayer of the petition was that a writ of mandamus issue commanding Kipley, as superintendent of police of Chicago, to notify the civil service commissioners of all vacancies existing in the positions of assistant superintendent of police, inspectors of police and captains of police in the city of Chicago, and commanding the civil service commissioners to submit to Kipley, as superintendent of police, the names of not more than three applicants for promotion for each vacancy from the grade next below that in which such vacancy or vacancies exist, and that the petitioner have such other or further relief as the nature of the case required.

Kipley filed a separate answer, in which he insisted that he had acted, in all respects, in conformity with law. He also averred that although the act regulating the civil service of cities was passed and approved substantially as stated in the petition, and was afterwards submitted to a vote of the electors of Chicago and adopted by a large majority of votes, it was "unconstitutional and void," in that it purported to confer judicial powers and authority to make and enforce judgments and decisions of a nonjudicial body, described and set forth in the act as the civil service commission.

Subsequently, June 28, 1897, the city council of Chicago passed an ordinance designating certain public officers who should be selected by the mayor with the concurrence of the council. Kipley, July 10, 1897, filed a plea, setting forth this ordinance, and alleging, in relation to the appointment by the civil service commissioners of certain subordinate police officers of the city, that they "have been, if they ever were within the same, wholly taken away from and removed out of the control, jurisdiction and power of the said civil service commissioners, so that such matters are now expressly excepted by its very terms from the force and effect of said Civil Service Act."

On the 7th day of October, 1897, Kipley asked leave of the

POOR COPY

court to withdraw his plea, and also to amend his answer so as to embody therein averments to the effect that the relator was not entitled to a writ of mandamus and that the court had no jurisdiction or power to grant the same, because the said Civil Service Act of March 20, 1895, was null and void and contrary to the constitution of the State of Illinois and the Constitution of the United States in that —

"1. It abridges the privileges and immunities of the citizens of the United States, because it operates to exclude from the classified service of such city as therein specified all such citizens as do not apply for office or for place of employment.

"2. The said act of March 20, 1895, deprives a duly elected and qualified officer of the right to select his subordinates and provide the requisite agencies for performing his official duties, thus abridging the rights, privileges and immunities belonging and guaranteed by the said constitutions, respectively, to every citizen thereof.

"3. The said act of March 20, 1895, provides for the invasion of the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.

"4. The said act of March 20, 1895, purports to prescribe for the criminal trial of public officers for nonfeasance, for misfeasance, for malfeasance in office, and for the infliction of penalties therefor, of deprivation of office, of fine, of imprisonment, and incapacity to hold office thereafter by non-judicial body, and in such manner that the accused shall not enjoy the right to a speedy and public trial by an impartial jury of the State or district wherein the crime shall have been committed; and without informing the accused of the nature and cause of the accusation; and without confronting the accused with the witnesses against him; and without permitting the accused to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for the defence.

"5. That the said act denies to the citizens the freedom of political action, making it highly penal for the citizen to take part in party politics.

BLEED THROUGH

"6. That said act of March 20, 1895, provides for the creation and maintenance of an office-holding class, at the expense of the people who are excluded therefrom by the operation of the said act.

"7. And generally said act of March 20, 1895, is directly in contravention of the right of that clause of the United States Constitution which prescribes that 'all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the laws.'

"8. And further, the said act of March 20, 1895, generally denominated the Civil Service Act, is absolutely null and void because the same purports to require the civil officers of the city of Chicago to undergo tests as to qualification for office and public employment in addition to the requirement of section 25 of article 5 of said constitution of the State of Illinois, and because it provides for a political test for the said commissioners respectively therein named, and because further the same is in contravention of section 22 of article 4 of said constitution as well as many other provisions of said state constitution."

Kipley also asked leave to file "a supplemental answer," averring that since the filing of his original answer the city council had passed the above ordinance of June 28, 1897.

The motions for leave to withdraw the plea, to amend the answer and to file a supplemental answer were severally denied.

On a subsequent day of the term Kipley entered a motion to discharge the rule requiring the respondents to answer the petition, and to quash all the proceedings that had been taken, assigning as reason therefor that the Civil Service Act of March 20, 1895, was contrary to the constitution of Illinois and the Constitution of the United States upon certain specified grounds. They were the same as those specified in the

POOR COPY

above motion for leave to amend the answer. That motion was also denied.

On the 22d day of December, 1897, the Supreme Court of Illinois rendered its final judgment, granting the relief asked in the petition for mandamus.

The final order of the court was that a writ of mandamus issue, commanding Kipley, superintendent of police of Chicago, to notify the civil service commissioners of all vacancies existing in the positions of assistant superintendent of police, inspectors of police and captains of police in that city, and the civil service commissioners to submit to him, as such superintendent of police, the names of not more than three applicants for promotion for each vacancy from the next grade below that in which such vacancy or vacancies existed.

Kipley, having given previous notice thereof, filed a petition for rehearing on the 8th day of January, 1898, but before that petition was disposed of he sued out a writ of error to this court. That constitutes case No. 586. The rehearing having been denied, he sued out another writ of error, and that constitutes case No. 601. The citation in each case was signed by the Chief Justice of the state court. The cases on motion were consolidated in this court, and are before us on a motion to dismiss each writ of error for want of jurisdiction.

We are of opinion that this court is without jurisdiction to review the final judgment of the Supreme Court of Illinois in these cases. The answer makes no reference whatever to the Constitution or laws of the United States. It is true that it avers that the Illinois Civil Service Act was "unconstitutional and void." But when the jurisdiction of this court is invoked for the protection, against the final judgment of the highest court of a State, of some title, right, privilege or immunity secured by the Constitution or laws of the United States, it must appear expressly or by necessary intendment, from the record, that such right, title, privilege or immunity was "specially set up or claimed" under such Constitution or laws. Rev. Stat. 709. Our jurisdiction cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing

BLEED THROUGH

the case up intended to assert a Federal right. *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648; *Levy* v. *Superior Court of San Francisco*, 167 U. S. 175, 177. The averment in the answer, that the statute of Illinois was unconstitutional and void, must be taken as intended to apply to the constitution of that State, and not to the Constitution of the United States. In *Miller* v. *Cornwall Railroad*, 168 U. S. 131, 134, this court, speaking by the Chief Justice, said: "We have no jurisdiction on a writ of error to a state court to declare a state law void on account of its collision with a state constitution; and it was long ago held that where it was objected in the state courts that an act of the State was 'unconstitutional and void,' the objection was properly construed in those courts, as raising the question whether the state legislature had the power, under the state constitution, to pass the act, and not as having reference to any repugnance to the Constitution of the United States. *Porter* v. *Foley*, 24 How. 415."

It is manifest that, when the answer was drawn, neither the defendant Kipley nor the learned counsel representing him intended to raise any question of a Federal nature. We cannot suppose that it occurred to either of them at that time that the Civil Service Act of Illinois was repugnant to the Constitution of the United States.

Nor was any question of a Federal character raised or intended to be raised by the plea which brought before the court the city ordinance of June 28, 1897.

It is, however, said that the motion for leave to amend the answer did specially set up and claim that the Illinois Civil Service Act violated certain rights, privileges and immunities belonging to the plaintiff in error under the Constitution of the United States. But as the Supreme Court of Illinois did not allow the proposed amendment of the answer the questions suggested by the amendment did not arise for determination. To the action of the court in disallowing the amendment, no exception was taken. The grounds upon which these motions were denied appear from the opinion of the court as follows: "By this motion respondent Kipley asks, first, for leave to withdraw his plea; second, to file an amended answer; and

POOR COPY

third, to file a supplemental answer. Nothing more is before us than the bare motion. No showing has been made nor reasons filed in support of the motion, and we are unable to say whether the motion should be allowed or not, and it must therefore be overruled." *People* v. *Kipley*, 167 Illinois, 638. This action of the state court does not raise a Federal question which this court can examine. The suggestion that the Federal questions which would have been raised, if the answer had been amended as proposed, should be considered upon their merits precisely as they might have been if the motion to amend had been allowed, cannot be entertained for a moment. It was in the discretion of the court to deny the motion to amend, when no reasons were assigned for its allowance, and to hold the parties to the issues made by the original petition and answer; and there is nothing in the record justifying the conclusion that its discretion, in that regard, was exercised with the intent or so as to deprive the defendant either of any right or immunity to which he was entitled under the Constitution or laws of the United States, or of the privilege of setting up or claiming in due time and in proper form any such right or immunity.

It may be observed that the opinion of the state court delivered upon final hearing contains nothing to show that any Federal question was considered or determined. The general subject to which the attention of the court was directed is shown by the following extract from its opinion delivered by Mr. Justice Magruder: "The evils sought to be remedied by legislation of this character are well known and well understood. These evils are such as grow out of what is generally called the 'spoils system.' . . . The foundation principles of the act are that appointments to municipal offices or employments must be made according to merit and fitness, to be ascertained by competitive examinations, free to all; and that promotions from lower to higher grades in the public service must be made upon the basis of merit." *People* v. *Kipley*, 171 Illinois, 60. The validity of the enactment in question was considered by that court with reference only to the state constitution.

BLEED THROUGH

Statement of the Case.

In respect of the motion to discharge the rule and all proceedings against the respondents it need only be said that it could have been denied upon the ground that the questions sought to be raised by it might more properly arise upon demurrer, plea or answer. Its denial did not have the effect to bring any Federal question into the record to be determined. It may also be observed that no exception was taken to the action of the state court in relation to this motion.

This court having no jurisdiction to reëxamine the final judgments of the state court in these cases, the motion to dismiss the writs of error is sustained.

Dismissed.

MR. JUSTICE WHITE dissented.

POOR COPY

END OF CASE